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CENTURY DIGEST AND ITS ANNUAL CONTINUATIONS.

In justice to the West Publishing Company and to ourselves, the editor of this journal desires to correct a careless statement made by our reviewer in the review of the work entitled Encyclopedia of Evidence, 56 Cent. L. J. 214, in which it was stated that the encyclopedic form of law book writing had superseded the "general digest."

The digests which were referred to in the review mentioned were "ordinary" digests—digests of special subjects, or such as are fragmentary in their scope and treatment, of which there are not a few still on the market. It is certainly true that a law book or digest in order to excel the encyclopedic form of law-writing must be of very superior merit. When such is the fact, however, the former need have no fear of competition from the encyclopedia, or any other form of law-writing, and the American Digest publications are certainly of this class. The use, however, of the phrase "general digest" in this review might very naturally point directly at the digest published by the West Publishing Company, and therefore do them and ourselves both an injustice. Our editorial, published in volume 53, page 341 of the CENTRAL LAW JOURNAL very accurately states both our private and public opinion of this incomparable system of digesting, done by West Publishing Company.

CRIMINAL LIABILITY OF PARENT OF CHILD WHO DIES WITHOUT MEDICAL TREATMENT.

By a decision which affects Christian Scientists and members of similar cults, the appellate division of the supreme court of New York, on March 26, 1903, reversed the conviction of J. Luther Pierson of Valhalla, Westchester county, on a charge of having failed to provide a physician for his adopted daughter. The baby, who was 16 months old, died, notwithstanding the prayers of Pierson, who is a member of the Christian Catholic Church of Chicago.

Judge Bartlett, who wrote the prevailing opinion, holds that the meaning of the law under which Pierson was convicted is not that in every case a regularly licensed physician and surgeon must be called in, but that the parent or guardian must exercise that degree of care which an ordinarily prudent and cautious person would take under similar circumstances. He held that the facts stated in the indictment did not constitute a crime. The court was not united in the decision. Judge Bartlett is supported by Judges Hirschberg and Jenks. Judge Woodward did not vote upon the question, but Judge Goodrich, the presiding judge of the division, dissents from the majority in an opinion to the extent that liberty of conscience cannot justify conduct which is dangerous to the peace and safety of the state. Judge Goodrich states his dissent as follows: "Liberty of conscience shall not justify practice inconsistent with the peace and safety of the state. The defendant willfully and intentionally refused to obey the statute and call in medical assistance, although he knew the child was dangerously ill of a sickness which there is evidence to show was curable, and the child died of the disease. This was evidence sufficient to require the court to submit to the jury the question whether medical assistance would have been beneficial to the child, and whether death resulted from the failure to call it. I have carefully examined the exceptions to the charge, and find no error. I think the judgment should be affirmed."

We are inclined to congratulate the state of New York on this decision. It shows that the courts of that state have the courage to maintain the sacredness of individual right from invasion, even if such invasion is attempted by the legislature under that ubiquitous, undefinable thing known as the police power. The tendency to interfere directly in the private affairs of the individual upon reasons that are altogether inadequate or superficial is a dangerous one, and one which, unless restricted, would ultimately destroy every vestige of individual right under the constitution.

What right has a state to tell a man to call in a physician of a certain recognized and licensed school when he, or one of his family, is sick, any more than to demand of him, under more serious conditions of health, that he shall receive the comforts of religion from certain recognized churchmen. If either were

justified, the latter would have better reason supporting it, to the extent at least that the soul is greater in importance than the body. "What shall it profit a man," says the Holy Writ, "if he gain the whole world and lose his own soul?" But the fact should be very evident that under neither of these conditions has the state any right to interfere.

Suppose, for instance, that a statute should prescribe that unless a parent provides medical attendance for his sick child, he shall be criminally liable for its death. Under such a statute must the parent call in a licensed physician? Suppose he has no confidence in either of the old schools, may he call in an osteopath, or a magnetic healer, or a Christian Scientist? Or, may he dispense with any or all of these and hire a trained nurse? Or, having confidence in his own experience and knowledge of disease, may he not minister to the sick one himself? Can it be said that, under any of these circumstances, the parent would be guilty of manslaughter? These questions suggest a train of argument, which if followed to its logical conclusion, will show the utter unreasonableness and gross injustice of such legislation.

It is charged upon good authority that vaccination is injurious and subjects the body to disease by the injection into the system of an impure and unhealthy virus; and yet, legislators, led on by those interested, will pass laws attempting to compel every child in the state, healthy or otherwise, to be inoculated with the poison of small-pox. We cite this merely to show how wildly our legislatures are ready to grasp at any new thing, and, by sumptuary methods, attempt to ram it down the throat of the individual citizen. In no department of legislation is this statutory testing of empirical dogmas or practices more dangerous than in that relating to the care of the sick. Every competent physician will admit that medicine is far from being an exact science; indeed, the practices of one generation of doctors is often condemned as criminal by the next. So that it is not for the state to say what is proper or sufficient medical treatment in cases of sickness. Indeed, physicians have admitted that in most cases nature must effect a cure, and that the doctor often, by a wrong diagnosis or for some other reason, retards rather than assists toward a recovery.

We believe this whole subject is altogether without the realm of legislation. If the legislature intends to hold a parent liable for negligence in causing the death of his children, there are circumstances which will have to be controlled, more prolific of untimely deaths than the failure to call in medical assistance. Failure in this latter respect is more often a benefit than otherwise, as good nursing and simple home remedies have amply demonstrated. But there are cases in which impure air, lack of proper food, insufficient clothing, and other similar circumstances have done more to increase infant mortality than any other, or all other causes, combined. And still it is well recognized that all these things are more appropriately the subject of the philanthropist or educator, than of the legislator; and to make the individual man, with all his frailties and peculiarities in disposition and belief, criminally responsible for failing to comply with what the legislature believes to be right and proper under any of the circumstances mentioned, is as ridiculous as it is unjust.

NOTES OF IMPORTANT DECISIONS.

EVIDENCE—UNITED STATES CENSUS REPORTS AS EVIDENCE OF POPULATION.—Are the United States census reports conclusive evidence of population? In the recent case of State v. Davis, 92 N. W. Rep. 740, the Supreme Court of Nebraska says that they are not. Nevertheless, the case holds that they are *prima facie* evidence. This was a case where the attorney general of the state was contesting the right of a certain county to elect a certain official which could only be elected by and was only provided for counties having over 8,000 population, the attorney general claiming that the county had a population of less than 8,000. The census returns for 1900 gives the population of the county as 7,390. The respondent attempted to show by the percentage of votes cast at the election in 1900 that the population must be over 8,000. The court in answer to this contention, said: "While the United States census reports are not conclusive as to the true population in any given territory, they afford very satisfactory evidence of the fact in dispute, and, unless overcome by competent evidence of some other character, should, we are satisfied, be accepted as *prima facie* evidence of the total population of the territory under consideration."

JURIES—COERCION OF JURIES BY FORCING THEM TO CONTINUE IN CONSULTATION WITHOUT SLEEP OR FOOD.—Some persons are always calling us back to the "good old times" of the past until some of us have come to believe that

the world must be fast going to the dogs and are sometimes led to regret the fact that we had not been born sooner, in one of those earlier ages when all people were good and life was one sweet song. Under such circumstances it sometimes cheers our hearts to learn that in some things, at least, there has been some improvement. An interesting instance of a clear abrogation and improvement upon the common-law is illustrated by the recent case of Russell v. State, 92 N. W. Rep. 751, where the Supreme Court of Nebraska had under consideration the question whether the fact that a jury has been kept together an unusually long time without reasonable opportunity for sleep will vitiate a verdict. They held that it would do so unless it was shown by the testimony of the jurors themselves that the agreement which they arrived at under the circumstances was deliberate and voluntary, and not due to fatigue or exhaustion. In this case the testimony of the jurors themselves showed that they were wholly unaffected in their agreement by physical inconvenience or exhaustion. This being so the court held that defendant had no reason to complain.

But on the general question whether a jury can be coerced into a verdict, the court speaks very interestingly, showing that while such was the rule at common-law it is altogether inconsistent with our present standards of civilization, and with what the law regards as a necessary element in every verdict. On this point the court said: "Another assignment of error is grounded upon the conceded fact that the jury were, after the submission of the case, kept together for 89 hours without beds, cots, or other usual facilities for obtaining sleep. They were given food, fire, and reasonable opportunity for exercise, but it is insisted that their verdict was, neverless, the result of physical coercion. The restraint, although an exceptionally long one, was not *per se* unlawful. Section 485, Cr. Code. The length of time a jury shall be kept together in consultation is a matter over which the trial court has a large discretionary power; and, according to the ancient authorities, the privations which the jury in this case were compelled to endure would not tell against their verdict. It was the practice in England, even in the time of Blackstone, to keep the jury out without meat, drink, fire, or light, and to compel them to follow the judge's cart to the next assize if they did not come to an agreement by the end of the term. Proffatt, Jury Trial, § 475; Thomp. & M. Juries, § 310; 3 Bl. Comm. (Hammond's Ed.) 496. But this practice has been long obsolete. In every civilized country jurors are now furnished the ordinary accommodations and comforts of life, and it has, we believe, become a fixed principle of general jurisprudence that a verdict cannot stand which is the result of any species of coercion."

The authorities on this question are in conformity with court's position in the principal case. Whart. Pl. & Prac. § 731; Com. v. Purchase, 2 Pick. 521, 13 Am. Dec. 452; People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168; People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203. The doctrine of compelling a jury to agree by the pains of hunger and fatigue was denounced by Chancellor Kent in People v. Olcott as a monstrous doctrine, and "altogether repugnant to a sense of humanity and justice." And so it was. It had its origin and vogue in rude times, and among a rude people, but, as manners and sentiments improved, it fell into disuse, and no vestige of it now remains. There is now in substance, as well as in form, a trial by jury. The verdict must, as was said by Chief Justice Parker in Com. v. Purchase, be the result of a real, and not a formal, *concensus* of opinion. It must represent intellectual conviction, not mere lack of physical endurance.

"IDENTIFICATION" AND "APPROPRIATION" AS NECESSARY TO PASS TITLE IN A BARGAIN AND SALE.

After a contract of sale has been formed the first question which suggests itself is naturally, what is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement? The distinction between the two contracts consists in this, that in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas in the executory agreement the goods remain the property of the seller till the contract is executed. In the one case A sells to B; in the other, he only promises to sell. In the one case, as B becomes the owner of the goods themselves, as soon as the contract is completed by mutual assent, if they are lost or destroyed, he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, and has at common law no other remedy for breach of contract, than an action for damages.[1]

It is the general rule that when the agreemen of sale is for a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is executory and the property does not pass Where the contract is for the sale of goods generally described and not referred to as forming part of a specific lot, there is no dispute that title does not pass until the goods have been separated or otherwise identified. This is equally true when the sale is of an article to be manufactured Where, however, the sale is of a certain quantity of goods which constitute a portion of a desig-

[1] See Benjamin on Sales (3d Ed.), sec. 348.

nated and uniform mass, it has been held by some authorities that no separation or appropriation is necessary in order to pass title. But this view is supported neither by principle nor the weight of authority. The general rule governs this class of cases as well as the others, and an appropriation is necessary to cast the title upon the purchaser.[2]

It is the general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the goods sold, delivered to the purchaser.[3] Chancellor Kent, in his Commentaries, volume 2, page 492, says: "The common law very reasonably fixes the risk where the titles resides, and when the bargain is made and rendered binding by giving earnest or by part payment or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attach to the purchaser. The rule as here laid down, should, however, be taken with the qualification that nothing remains to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require. Except for the purpose of satisfying the statute of frauds, the seller is not bound to deliver the property sold, unless he has agreed to do so, and the buyer must take it where it is at the time of the sale."[4]

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time, but is none the less one contract; viz., a bargain and sale of goods. The selection of the goods by the one party and the adoption of that act by the other, converts that which was before a mere agreement to sell into an actual sale, and the property thereby passes. This doctrine presents no difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfill an agreement which in itself does not designate the goods. The effect is then the same as if the parties had, from the first, agreed upon a sale of those specific goods. But the express or implied assent of both parties to the subsequent appropriation is essential. The only difficulty that can arise on this question is in cases where the seller only, under the implied or express authority of the purchaser, has made the subsequent appropriation. When, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and when once he has done that act the election has been irrevocably determined, but till then he may change his mind. It follows from this that where, from the terms of an executory agreement to sell unspecified goods, the seller is to dispatch the goods, or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made finally and conclusively by the authority conferred in the agreement. Thus, where a seller delivers goods to a carrier by order of the purchaser, the appropriation is determined. The delivery to the carrier is a delivery to the purchaser and the property vests immediately.[5]

Where the agreement is for the sale of goods to be manufactured, the same rule applies as in the case of unspecified chattels; the contract is executory, and the title does not pass until the manufacture is completed and goods selected, separated, and made ready for delivery.[6] In Hatch v. Standard Oil Co.,[7] the court cites many authorities sustaining the proposition that: "When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer, the contract is merely an executory agreement, unless it contains words warranting a different construction, or there be something in the subject-matter or the circumstances to indicate a different intention."

If an order for goods is received and accepted within a reasonable time to be delivered at a time certain the receipt and acceptance of the order does not constitute a complete or executed contract until the goods are delivered to the carrier, and if the purchaser countermands his order before that time, or before the goods have been separated from the general mass he cannot be compelled to pay the contract price, but can only be compelled to pay damages, which ordinarily is the difference between the contract price and the market price at the time and place of delivery. In Unexcelled Fire Works Co. v. Polites,[8] the Supreme Court of Pennsylvania held that: "Where, after the seller has accepted a written order from the buyer for goods to be shipped on a certain day, the latter notifies him not to ship them, and refuses to accept them from the carrier when they are shipped, an action will not lie for the price of the goods, but for the damages for the

[2] 21 Am. & Eng. Ency. Law, 485, *et seq.*

[3] Olyphant v. Baker, 5 Denio, 379; Terry v. Wheeler, 25 N. Y. 520; Leonard v. Davis, 1 Black (66 U. S.), 476.

[4] Story Sales sec. 301; Bradley v. Wheeler, 44 N. Y. 495.

[5] 21 Am. & Eng. Ency. Law, 494.

[6] *Id.* 502.

[7] 100 U. S. 554.

[8] 130 Pa. St. 536, 18 Atl. Rep. 1058.

refusal to accept them." In deciding this case the court said: "It is plain that the notice given to the plaintiff by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiff thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant." In Warten v. Strane,[9] the Supreme Court of Alabama held that: "Title does not pass on the sale of 100 bushels of corn, part of a larger mass, from which it is afterwards to be separated by the seller." In deciding this case the court said: "The principle is familiar, that where there is a contract of sale of personal property, and anything remains to be done to individualize and identify the particular property intended to be sold, such as counting, weighing, measuring, or separating from a larger mass or bulk, no title passes to the purchaser, such as will maintain in his favor an action of detinue or trover. This is for the simple reason that the particular part of the property or chattels contracted to be sold and delivered cannot be ascertained by precise identification." In Jones v. Jennings Bros.,[10] the Supreme Court of Pennsylvania held that: "Since the remedy of the vendor in a contract for the sale of goods not specific, against a vendee who refuses to receive the goods, is by action for special damages in the amount of the difference between the market value of the goods at the time agreed for delivery and the contract price, his failure, in such action, to submit evidence of the market value as compared with the price, will defeat his recovery." In Illinois it has been held that an agreement to sell an article by weight or measure, where the article is identified and the price agreed upon, may be a completed sale, if the parties intended it as such, although the article sold is not weighed or measured.[11]

Parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case the courts have applied certain rules of construction, which in most instances furnish conclusive tests for determining the controversy. When the specific goods to which the bargain is to attach are not agreed on it is clear that the parties can only contemplate an executory agreement. If A buys from B ten sheep to be delivered thereafter, or ten sheep out of a flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the mere contract; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B and to have become the property of A.[12] In McCormick Harvesting Machine Co. v. Cusack,[13] the Supreme Court of Michigan held that the plaintiff could not recover the contract price for a machine that the defendant had ordered to be consigned to the care of S, agreeing to give notes on the delivery thereof, even though it was shown that plaintiff had consigned several machines to S, but consigned none to the defendant, and thereafter defendant told S that he countermanded his order and S told him he had his machine ready for him, but did not point out any machine as his. The McCormick people lost the case because S had not set apart any particular machine for Cusack before he countermanded his order. In McCormick Harvesting Machine Co. v. Markert,[14] the order was taken by one McNaughton, an agent of plaintiff. Some time after, defendant went to Manson, Iowa, and notified one Kenning, who was plaintiff's local agent at that point, that he wished the order returned to him, and Kenning responded that he would try and get it. Nothing was ever said or written to plaintiff on the subject, and the court held that this did not amount to a countermand of the order. In this case the court said that: "Where everything has been done by the seller which he is required by his contract to do, and the manufactured property, in its completed condition, is tendered to the purchaser, and he refuses to receive it, and it is held by the seller for the purchaser, the vendor may recover the contract price." On the vital point in the case, however, which was the contention that no particular machine was ever set apart for the defendant or tendered to him, the court decided that inasmuch as he refused to recognize the contract or receive any machine under it no specific tender was necessary. The result of the decision in this case was the opposite of the result in the Michigan case, and unless the Supreme Court of Iowa changes its decision on a rehearing of the case the defendant Markert will have to pay for the machine whether he takes it or not. These two last mentioned late decisions of the highest state courts show the uncertainty of litigation in cases of this character. The law is not uncertain, and a fact is always a fact, but the expounding of the law is not always the same.

In the treatment of the subject under consideration we should perhaps state that there is per-

[9] 8 So. Rep. 231.

[10] 32 Atl. Rep. 51.

[11] Holliday v. Burgess, 34 Ill. 193. Also, see Straus v. Minzensheimer, 78 Ill. 492; Luthy & Co. v. L. Waterbury & Co., 140 Ill. 664; Foster v. Magill, 119 Ill. 75; Wade v. Moffett, 21 Ill. 110.

[12] Benjamin on Sales, secs. 349 and 350.

[13] 74 N. W. Rep. 1005.

[14] 78 N. W. Rep. 33.

haps a seeming exception to the rule just stated. This exception exists in cases where the grain of various parties is mixed together in a public warehouse. Here the parties are tenants in common of the whole mass, and each one may transfer his right and title to his portion without separating it from the common mass, as by merely giving a delivery order. The reason of the rule lies in this, that the whole matter is a question of the intention of the parties. There is always a strong presumption in ordinary contracts of sale that the parties intended to pass a title in severalty to the goods, and not a title in common with others to the greater mass; so that where the presumption is not rebutted, the courts hold that the intent of the parties is to pass a title in severalty, and this can never be done without separation and segregation. Where, however, there is a usage of trade, as in case of grain elevators, of which the parties are cognizant, a presumption may be created that the intent of the parties was to pass merely a title in common, so that separation is not necessary. This is the explanation presented by Mr. Tiedeman (section 88), in his work on Sales, and it is believed to be the only one by which the apparently conflicting authorities may be reconciled and a uniform rule established.[15] In Mackellar v. Pillsbury,[16] the Supreme Court of Minnesota say that it is settled in that state that where a certain number of articles are sold out of a greater number of exactly the same kind and quality, with the intention that the title should presently pass, and where the vendee has the absolute right at any time to take the amount or number out of the whole mass or quantity, this is sufficient to pass the title, although the specific articles are not actually designated or separated from the remainder; that under such circumstances, until the separation is made the vendor and vendee are tenants in common of the whole according to their respective interests. The same court in Jennison v. Thompson,[17] in deciding a case where there was an agreement to purchase a certain quantity of wheat out of a greater quantity, all of the same uniform kind and quality, and where the price was paid, but the quantity sold was not segregated, held it was a question of fact for the jury whether or not it was the intention of the parties that title should pass before delivery, and it was error to hold as a question of law that title had passed. In Gibson v. Stevens,[18] it was held that where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee. In an extensive note to this case (Lawyers' Co-Op. Edition) the authorities are collected on the subject of delivery of ponderous and bulky goods and what is sufficient to transfer the title. It is only necessary, in cases of ponderous or bulky goods, that they be put under the absolute power of the buyer, or buyer's authority as owner be formally acknowledged, or that some act should be done importing a surrender of them on the one side, and an acceptance of them on the other. Delivery of part will pass title to the whole where nothing beside remains for the seller to do. Affixing particular marks to the goods sold, or cutting the spills of wine casks, will be sufficient to pass the title. The property, however, must be identified.

Where goods have been purchased upon an agreement to give a promissory note for the price, payable in one year with interest, on a refusal of the purchaser to make and deliver the note after the goods have been delivered, the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement, and the measure of damages will be the price of the goods sold and delivered.[19]

When it is conceded that there has been a purchase and sale of specific personal property and that the identity of the very property sold has been determined; that the title to the property has passed to the buyer; that nothing remains to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require, and the purchaser refuses to accept it, the seller has three remedies against the purchaser in default. He may store the property for the buyer, and sue for the purchase price; or may sell the property as agent for the vendee, and recover any deficiency resulting; or may keep the property as his own, and recover the difference between the contract price and the market price at the time and place of delivery.[20] In Hayden v. Demets,[21] it is held that the rule last stated applied not only to cases where the title passed at once, but also to cases where the contract was executory, but there had been a valid tender and refusal.

J. C. McMATH.

[15] 21 Am. & Eng. Ency. Law, 492.
[16] 51 N. W. Rep. 222.
[17] 71 N. W. Rep. 380.
[18] 8 How. (49 U. S.) 384.
[19] Stephenson v. Repp (Ohio), 25 N. E. Rep. 803.
[20] See Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N E. Rep. 415; Putnam v. Glidden, 34 N. E. Rep. 81; John A. Roebling's Sons Co. v. The Lock Stitch Fence Co., 130 Ill. 660; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.
[21] 53 N. Y. 426.

FOREIGN DIVORCES AND THEIR EFFECT ON STATUS AND PROPERTY RIGHTS.

Recent decisions by the United States Supreme Court have much accentuated the diversity of opinion among the state courts as to the effect upon *status* of spouses and their property rights in states other than those where divorces are granted on substituted service.

It may be well in treating this question to first ascertain what this tribunal has so far decided in respect to these things, then indicate the varying views of the state courts, and finally endeavor to show to what extent the faith and credit clause of the federal constitution makes the federal tribunal the supreme arbiter in the differences extant, and wherein there is hopelessness of settlement by any authoritative tribunal. Our complex system of government enables such unadjustable conflict sometimes to occur, most pointedly in matters of general law, by which is understood commercial law, principles of the common law and public policy, as to which the federal courts declare themselves independent of the state tribunals in construction, and which independence has introduced into the states conflicting decisions between state and federal courts, where the mere quality of citizenship gives or denies to the latter any jurisdiction. Unless the federal courts shall assume a like independence over and beyond that deducible from the faith and credit clause of the federal constitution, the conflict between the state tribunal, that this clause cannot conclusively settle, will never be so unseemly, if as serious as the other, for this would not be a conflict existing over one and the same jurisdiction, but merely between different jurisdictions.

The most important of the federal cases is one of the four recently appearing in the same volume, in which the conclusion of a majority was announced in an opinion by Justice Gray, the dissentients being the Chief Justice and Justice Peckham.[1] A full synopsis of this opinion is deemed necessary here in view of the part it plays in this article.

The issue in this case was the claim by the husband, defendant in a suit for limited divorce in New York upon the ground of cruel treatment, that the absolute divorce obtained by him in Kentucky, upon the ground of abandonment, rendered upon substituted services, conclusively fixed the *status* of both parties as no longer husband and wife. This contention was by the New York courts denied. The opinion of reversal by the federal court was to the effect, that the faith and credit clause of the federal constitution gave the Kentucky decree the same validity and effect in New York as in the former state. The learned justice carefully reviews many state cases showing especially by Kentucky decisions, that, where the matrimonial domicil was in that state, a decree on substituted service determined the *status* of parties in that state. Following the review of state cases this very guarded language is used: "The wide diversity of opinion admonishes us to confine our decision to the exact case before us. This case does not involve the validity of a divorce granted, on constructive service, by the court of a state, in which only one of the parties ever had a domicil; nor the question to what extent good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the state, which had always been the undoubted domicil of the husband and which was the only matrimonial domicil of husband and wife." The conclusion was drawn that notice being given as prescribed by Kentucky statute, the "divorce established beyond contradiction that the wife had abandoned her husband and precludes her from asserting that she left him on account of cruel treatment." The opinion further said: "To hold otherwise would make it difficult, if not impossible for the husband to obtain a divorce, as otherwise he must sue in the state, in which she was, and this very fact would be an admission of her having a separate domicil, which he denied and would disprove the allegation of abandonment."

In two of the other cases referred to it was decided, that, though the pleadings were regular on their face as to domicil of one of the parties, the decree obtained on substituted service was entitled to no faith and credit, if neither of the parties had a *bona fide* domicil in the state of rendition.[2]

[1] Atherton v. Atherton 181 U. S. 155, 52 Cent. L. J. 484.

[2] Bell v. Bell, *Id.* 175; Streitwolf v. Streitwolf, *Id.* 179. The United States Supreme Court has since this article was prepared handed down a decision in the case of Andrews v. Andrews, 23 Sup. Ct. Rep. 237, in which cases *supra* are approved, and it is further decided, that the appearance of a nonresident defendant cannot invest a court with jurisdiction of a suit for divorce, begun by a plaintiff not a *bona fide* resident within a state nor shield a decree in such a case by means of the faith and credit clause of the U. S. constitution. The following is quoted from this case showing how impotent in the absence of domicil is personal appearance. The principle dominating the

In the other case the New York court was affirmed in giving force and effect to a decree upon supplemental proceedings to amend original decree, so as to include alimony. The suit was upon publication service, and without appearance by husband, defendant, divorce was awarded. To the supplemental proceeding be entered appearance, and the decree was held to be entitled to protection under the faith and credit clause of the constitution.[3] In the opinion by the New York court it is pointedly declared that the original decree "was effectual to determine the wife's *status* as a citizen of New Jersey, but effected nothing as to defendant for want of personal service," but the federal court said nothing on this subject.

In a former case originating in New Jersey the supplemental decree awarded alimony, but the husband, defendant, appeared in resistance to the original decree, which merely, granted the divorce, and not to the supplemental proceeding. The federal court reversed the New York Court of Appeals and held that defendant was in court as to the supplemental bill, and the decree thereon was entitled to faith and credit, the same as given it in New Jersey.[4] It was held where a divorce was obtained by a husband without notice to the wife, her possessory right to land settled upon by him and her under the public land laws was terminated, as this was not a vested interest acquired during the marriage relation. The land was situated at the domicil of the husband. It was said, *arguendo*, that dower and curtesy would follow the same rule.[5] Previously it was held, that divorce with jurisdiction over the parties barred dower in another state.[6]

subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

[3] Lynde v. Lynde, *Id.* 183, 162 N. Y. 405, 56 N. E. Rep. 929, 48 L. R. A. 679.

[4] Laing v. Rigney, 160 U. S. 542, 152 N. Y. 191, 40 N. E. Rep. 180, 36 L. R. A. 549.

[5] Maynard v. Hill, 125 U. S. 190.

[6] Barrett v. Failing, 111 U. S. 523.

For a decree upon substituted service to have any effect anywhere, it is necessary for the requirements of the statute to be strictly observed.[7] In Cheever v. Wilson, it appeared that to the suit for divorce, on substituted service the husband, defendant, appeared and contested the *bona fides* of domicil of the wife. A finding in her favor entitled the decree to faith and credit elsewhere, the court observing that a wife may acquire a separate domicil whenever it is necessary or proper for her to do so.[8] Generally this case also held that, if jurisdiction is had of both parties, the decree has the same validity and effect elsewhere as at the place of domicil.[9]

The only other federal case I have found, rules that the state's power to determine the *status*, or domestic and social condition of persons domiciled therein, except as restrained by the federal constitution, is undoubted.[10]

Before passing from this citation of federal cases it may be well to refer to the dissent in Atherton v. Atherton, *supra*, in which it was declared to be: "At war with sound principle and the adjudged cases 'to say,' that a husband can drive his wife from home by his conduct, force her to find another domicil, then sue for divorce for abandonment, and the decree be conclusive against her action for a divorce in the new domicil she has been forced to acquire," as an illustration of the rigidity, with which the faith and credit clause is applied by a court, whose previous adjudication showed that a wife might "acquire a separate domicil whenever it is necessary or proper for her to do so."[11] Also it may be here remarked, that in no other instance than in a divorce case, has it, I believe, been held by the federal or any other American court that an *in personam* effect is to be given to substituted service. While many state courts have held, and text-writers have contended, that substituted service is sufficient to destroy the *status* of marriage, this was on the theory that this *status* was a *res* at the domicil of either and both spouses. The Atherton case however expressly declines so to rule, and its holding is based on the proposition, *exnecessitate rei*, that the wife was barred from as-

[7] Cheely v. Clayton, 110 U. S. 701.

[8] 9 Wall. 108.

[9] See also Barber v. Barber, 21 How. 589.

[10] Strader v. Graham, 10 How. 82. See also Pennoyer v. Neff, 95 U. S. 714.

[11] Cheever v. Wilson, *supra*.

serting that she had a domicil in New York, but instead her domicil was in Kentucky. Having such domicil it was in the undoubted power of that state to authorize its courts to adjudge her no longer married to her husband.

I will now endeavor to trace the course of decision in the states. The most *ultra* of the cases I have discovered, refusing recognition to a foreign divorce on substituted service, is one from South Carolina, wherein it was held, that the wife's dower in land in that state was not barred, notwithstanding that the divorce was obtained upon her suit, upon the ground of no jurisdiction over defendant. It was distinctly denied that anything in the nature of estoppel could work an opposite result[12] in the case. Massachusetts appears to have regarded the power of estoppel differently, for it was there held that a decree in favor of a husband dismissing the wife's libel for divorce upon the ground that he had already obtained divorce from her on substituted service in another state, "estopped her from averring anything to the contrary of the decree in Illinois, purporting to sever that (marriage) relation," and dower out of land in that state was denied.[13] The case in which the libel was dismissed was stated by Justice Gray, in Atherton v. Atherton, *supra*, to rule that divorce on publication service by court of matrimonial domicil concluded the wife against contradicting the fact of desertion as alleged, so as to file a libel for divorce in another state where she had acquired a residence.[14]

It may be assumed that all of the states that have held, that non-resident defendants, served by publication, may by cross petition, bill, or complaint obtain a decree of divorce outside of their domicil,[15] would not approve the conclusion reached by the South Carolina court, at least, that seems to me to logically follow.

In Pennsylvania, Ohio, Wisconsin, Vermont, and Illinois it has been held that a decree rendered on substituted service in another state would not deprive the wife of dower in lands elsewhere, though it might dissolve the marriage relation between the parties.[16] Dower does not appear to have been involved in the three cases last cited, but in the Wisconsin case it was broadly ruled that inchoate interests in the husband's property were not to be affected by such a decree. In the Vermont case it was said it could have no effect on property rights, and in the Illinois case it was directly ruled the homestead to an abandoned wife given by the statute could not be thus taken away, as this right was incident to the marriage the same as dower. In Indiana, Kentucky, and Missouri decrees so obtained were held to bar dower elsewhere by force of statutes prescribing that divorces have such effect, these statutes being construed to apply as well to foreign, as to domestic, divorces.[17] The Indiana case also says that the decree is not open to collateral attack on the ground that plaintiff was not a *bona fide* resident. The Missouri statute prescribed that "if the husband be divorced from the wife for her fault or misconduct she shall not be endowed," and the court permitted that fault or misconduct to be regarded as established by a decree upon substituted service, while the Ohio court, in Doerr v. Forsythe, *supra*, held that fault or misconduct meant such as could authorize divorce in Ohio, and further, as the wife "had no opportunity to defend, all that can be claimed for the decree is, that it dissolved the marriage relation." The Missouri court also maintained that the marriage relation being dissolved absolutely and everywhere, "property rights dependent alone upon its continued existence must cease" everywhere. "The husband is no longer entitled to curtesy in the wife's lands, or to receive to his possession her choses in action, and the wife's incomplete right to dower in his lands, wheresoever situate, must cease," and says: "these are the doctrines of common law." Then is quoted the statute prescribing she shall not lose her dower, unless divorce is for her fault.

[12] McCreery v. Davis, 44, S. C. 191, 28 S. C. 655.

[13] Hood v. Hood, 110 Mass. 463.

[14] Hood v. Hood, 11 Allen 196. See also Burlem v. Stannon, 115 Mass. 438.

[15] Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. Rep. 148, 15 Am. St. Rep. 38; Sterl v. Sterl, 2 Ill. App. 223; Jenness v. Jenness, 24 Ind. 359, 87 Am. Dec. 335; Watkins v. Watkins, 135 Mass. 83; Chilton v. Chilton, 108 Mich. 267, 66 N. W. Rep. 53, 31 L. R. A. 160; Jones v. Jones (N. Y.), 15 N. E. Rep. 707, 2 Am. St. Rep. 447; Fisk v. Fisk (Utah), 67 Pac. Rep. 1064; Ferry v. Ferry, 9 Wash. 239, 37 Pac. Rep. 431.

[16] Platt's App., 80 Pa. St. 501; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 703; Cook v. Cook, 56 Wis. 195; Prosser v. Warner, 47 Vt. 667; Lynn v. Sentel, 183 Ill. 382, 75 Am. St. Rep. 110.

[17] Holbish v. Hattel, 145 Ind. 59, 33 L. R. A. 783; Hawkins v. Ragsdale, 80 Ky. 353; Gould v. Crow, 57 Mo. 200.

Apart from what the court says are the "doctrines of the common law," to which I will advert later herein, it seems to me that the statute requires the wife's fault to be affirmatively shown before dower is lost, and this cannot be done by a decree on substituted service, against which she had no opportunity to defend, unless the principle in Atherton v. Atherton, *supra*, applies. If the wife had obtained this divorce upon like service, the Missouri court, following the reasoning in a case from Maine, would have awarded dower, that state having a statute of like import.[18]

The Iowa Supreme Court took the same view as to dower ceasing upon the dissolution of the marriage as was expressed by the Missouri court.[19] But it has been strenuously denied, that such is the effect, or was the effect, at common law of statutory divorce as to marriage originally valid, unless the law specifically so provides. The maxim by Lord Coke of *ubi nullum matrimonium ibi nulla dos* is claimed to apply only to a case of a marriage void *ab initio*,[20] as the English law did not allow divorces a *vinculo* for cause subsequent to marriage. All such divorces, adultery being the only ground, were a *mensa et thoro*, and it will hardly be claimed, that these barred dower. It is further pointed out, that in all parliamentary divorces a *vinculo* a clause barring dower was uniformly inserted. It was said by the Court of Appeals of New York, that though dower "is contingent and becomes absolute only by survivorship, still it is a vested right of which the wife can only be deprived by her own act or by forfeiture."[21] It must be admitted, however, that the great current of authority, including the federal supreme court[22] is against this view, the contrary effect being assumed without discussion.

In Alabama, California, Kansas, relations to the estate of the deceased husband have been held to be affected by foreign decrees on substituted service. In Alabama, the matrimonial domicil, whence the husband removed to Arkansas, there obtained divorce, remarried, returned to Alabama, died, both wives surviving. To the second wife homestead and exemption were allowed out of his estate.[23] In California, New York being the matrimonial domicil,—husband having removed to Missouri where he obtained divorce and then to California where he died, it was held, the former wife was not entitled to administer as widow.[24] And in Kansas, to which state the husband returned after procuring divorce in another state, it was held that a suit by former wife for alimony could not be sustained.[25]

It seems to be the rule in Massachusetts and New Jersey, that a constructive service decree will be recognized in these states, as affecting *status*, if for a cause of action constituting ground for divorce in these respective jurisdictions.[26] But in New York it is said the rule of recognizing no such divorces upon any ground will be adhered to, until the federal supreme court shall declare differently.[27] As we have seen, this position has been reversed to the extent, that a constructive service decree rendered in the state of matrimonial domicil is entitled to faith and credit. It was also held in this state, that though the court had jurisdiction of the parties, if the divorce was upon a cause not there recognized, it would not defeat dower in that state.[28] But this doctrine may be considered as overruled by the Atherton case.

Though also the divorce be on constructive service, it will be recognized if rendered at the legal domicil of both parties; and the fact, that the divorce is upon a ground not recognized in Massachusetts, and that the marriage occurred in that state, the then domicil of the parties, will not prevent its barring both curtesy and dower as to land there situated.[29]

Collateral Attack.—There is a strong current of authority to the effect, that these decrees though regular upon their face may be attacked as void because of the lack of *bona fide* residence, necessary to give the court jurisdiction.[30] The case from Indiana of Hil-

[18] Harding v. Allen, 9 Me. 140.
[19] Marvin v. Marvin, 59 Iowa 699; Boyle v. Latham, 61 *Id.* 174.
[20] Scribner on Divorce, p. 541 and cases cited.
[21] Wait v. Wait, 4 Comst. 95.
[22] Maynard v. Hill and Barrett v. Failing, *supra*.
[23] Thompson v. Thompson, 91 Ala. 591, 11 L. R. A. 443.
[24] *In re* James, 99 Cal. 374, 37 Am. St. Rep. 60.
[25] Roe v. Roe, 52 Kan. 724, 39 Am. St. Rep. 367.
[26] Loker v. Gerald, 157 Mass. 42, 34 Am. St. Rep. 252; Felt v. Felt, 59 N. J. Eq. 47 L. R. A. 546.
[27] Williams v. Williams, 130 N. Y. 193, 14 L. R. A. 220; Lynde v. Lynde and Atherton v. Atherton, *supra*.
[28] Van Cleaf v. Burns, 118 N. Y. 549, 133 N. Y. 540, 15 L. R. A. 542
[29] Ross v. Ross, 129 Mass. 243 and cases cited.
[30] Shannon v. Shannon, 4 Allen, 134; Sewall v.

bish v. Hattel, *supra*, is the only one I find asserting the contrary.

Upon the whole it may be stated that scarcely another state fully supports New York and South Carolina in holding that the marriage *status* of a non-resident defendant not submitting to the jurisdiction of the domicil of the plaintiff is not affected, New Jersey doing so only qualifiedly, while other states, which recognize that the *status* is affected, deny that property rights are involved. Those, that hold, that dower and curtesy fall with the *status*, do not necessarily say or mean to say, that property rights are affected, as these are regarded as contingencies and not vested interests. By others it is by force of state statute, that dower is taken away. The Atherton case, carefully limited to the case at bar, treats both of the parties as Kentucky residents, and, as such, bound by legislation prescribing their social *status* or condition. Though that case reserves opinion as to how far the *bona fides* of domicil may be inquired into, yet I think it may be said, that the other cases in the same volume place the court on the side of the great weight of authority, that decrees upon constructive service may be shown to be void for the lack of real domicil. The view that court may take of dower and curtesy, namely, whether or not they are in any sense vested rights, will, it appears to me, determine, whether or not of parties having separate domicils, these survive divorce on constructive service. Alimony and costs must follow the rule as to ordinary money judgments.

It seems reasonably clear, that the dower and curtesy question comes within the purview of the faith and credit clause to be conclusively settled by the supreme federal tribunal. It does not seem as clear, however, that this clause enables that tribunal to determine for the different states the question of *status* so far as criminality, legitimacy and inheritance are concerned, and that its view, if it should so hold, that a marriage dissolved as to one of the spouses was likewise dissolved as to the other would not be binding on the state courts. In other words, a federal question would not be presented under the faith and credit clause of the constitution, if a decree for divorce on substituted service was held not to affect the social *status* of a citizen of another state.

NEEDHAM C. COLLIER.

St. Louis, Mo.

Sewall, 122 Mass. 156; People v. Dowell, 25 Mich. 247; Leith v. Leith, 39 N. H. 20, 56 Ind. 263, 125 Ind. 163, 78 Me. 187; Hoffman v. Hoffman, 46 N. Y. 30, 14 R. I. 378; St. Lure v. Lindsfelt, 82 Wis. 346, 19 L. R. A. 515; Adams v. Adams, 154 Mass. 290, 13 L. R. A. 275.

CREDITORS' BILL—FOLLOWING IMPROVEMENTS BY HUSBAND ON WIFE'S PROPERTY.

BRAND v. CONNERY.

Supreme Court of Michigan, December 29, 1902.

Where one who is solvent, with his wife's consent, expends all his money in improving her property, thereby enhancing its value many times, creditors who have trusted him for materials, believing the property to be his own, can follow such improvements to the premises upon which they have been made.

STATEMENT OF FACTS: In the fall of 1896 defendant James A. Connery made a contract with Boegert & Son to furnish the materials and do the carpenter work on a brick building he was erecting in East Saginaw. Boegert & Son made a contract with D. Hardin & Co. to furnish the door and window frames and cornice for the outside of the building and the entire inside finish of the building. The materials for the outside were furnished in the winter and early spring of 1897, and some time in May complainant began the delivery of the inside finish, which amounted to about $750. D. Hardin & Co. were paid about all the work and material amounted to for the work on the outside, leaving the inside finish alone unpaid. In May, 1897, Devillo Dennison, who had general charge of the business of D. Hardin & Co., learned that Boegert & Son were not responsible, and, before delivering any inside finish, informed Mr. Connery that they would not deliver any of the material for said inside finish without pay therefor upon delivery, unless he (Connery) would agree to pay for it, which Dennison testifies he did agree to do, but Connery denied, both in his answer and upon the stand, claiming that he only agreed to assist them in getting their pay, and did notify them every time he paid Boegert & Son any money. While the work was in progress Mr. Connery gave his note for $500, afterwards paid $100 on it, and renewed the note for the balance. Later he gave his note for the balance due on the contract, of $348.76. He has paid neither of those sums. D. Hardin & Co., before the 60 days had elapsed from the date of furnishing the last material, filed their lien on the property, and served a notice thereof, with a copy of their account, upon said Connery. When they commenced to enforce their lien, they learned that the land belonged to Mr. Connery's wife. Said lien suit terminated in a consent decree against said Connery and Boegert & Son for the sum of $888.85 in favor of complainant, and a de-

cree in favor of Mrs. Connery, declaring her land freed from all claim under the mechanic's lien. Later an execution was issued against said James A. Connery and Boegert & Son, which was returned wholly unsatisfied. An *alias* execution was issued later, and levied upon the real estate upon which complainant's building materials were used, viz., lot 7 in block 17 of Hoyt's plat of East Saginaw, in Saginaw county, Mich., and this bill was filed in aid of such execution and also as a judgment creditors' bill. The lot itself was not worth over $1,000, and was entirely unproductive. After the erection of said building it was worth $10,000; and, while defendants occupy one-third as a homestead, the remaining two-thirds yields a gross income of $900 per year. The entire expense of the building was defrayed from the means of Mr. Connery, except $2,500, borrowed on the property, $2,000 of which yet remains a lien on the land.

GRANT, J.: Mr. Connery had no credit at the time he made contracts for the erection of this building upon his wife's land. The only facts from which any intent to defraud either Boegert & Son or those who furnished the materials are that Mr. Connery made the contracts in his own name; that his wife knew it; that she furnished no funds; that Mr. Connery did not inform those with whom he contracted that he was not the owner of the building, but did in fact by his conduct treat it as his own, and to this conduct she by her silence assented. It is true that those with whom he was dealing might have ascertained, by examination of the record in the office of the register of deeds, that the record title was in his wife. But even prudent merchants are not always thus careful. We think that complainants had a right to believe that Mr. Connery was the owner of the land, and to deal with him as such. He expended all his means in the erection of the building. By so doing he became insolvent, and had not sufficient left to pay the claim of D. Hardin & Co. The question, therefore, is, can a person out of debt and solvent expend all his means in improving his wife's property, and thus become insolvent, and leave creditors, who have trusted him for materials to be used in such improvements without redress? Have such creditors a right by suit in chancery to pursue the property of their debtor, which, with the knowledge and consent of his wife, he has expended in improvements upon her property? Counsel have evidently made diligent search, and find no case directly in point. We also are unable to find any authorities decisive of the question, and must, therefore, decide it upon principle. The case is not within those where there were existing creditors; nor do we think it within the case of Cole v. Brown, 114 Mich. 396, 72 N. W. Rep. 247, 68 Am. St. Rep. 491, and authorities there cited, holding that, where there are no existing creditors, the voluntary conveyance of property by a husband to his wife is valid, unless conveyed for the express purpose of defrauding subsequent creditors. It is well established that an existing creditor may follow the improvements made by an insolvent debtor to the premises upon which they have been made by the consent of the wife, and that he has a lien upon them for his debts. Rose v. Brown, 11 W. Va. 122, 137, and Association v. Reed, 96 Va. 345, 31 S. E. Rep. 514, and authorities there cited. In all the cases cited by counsel for complainants in which the courts have allowed creditors to follow such improvements the debtor was, at the time of making the improvements insolvent. Such are the cases of Lathrop v. Gilbert, 10 N. J. Eq. 344; Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 376; Newcomb v. Phillips (Ky.), 9 S. W. Rep. 529; Burt v. Timmons, 29 W. Va. 444, 2 S. E. Rep. 780, 6 Am. St. Rep. 664; Thefethen v. Lynam, 90 Me. 276, 38 Atl. 335, 38 L. R. A. 190, 60 Am. St. Rep. 271. Mrs. Connery stood by and permitted her husband to enter into contracts enhancing the value of her property many times. She is several times richer than before. She has received the benefit of all her husband's property, and as well the property of complainants to the value of $888.85. Boegert & Son have not received the amount due them from Mr. Connery by about a like sum. This is not a case where a husband has made an absolute transfer of property to his wife, and has afterwards entered into business, contracted debts and become insolvent. He had transferred nothing to her when his contract with Boegert & Son was made. He had not agreed with her to do so. So far as she was concerned, he might have stopped work at any time, and removed the unused material. The transfer to her was complete only as the work was done, and after the material used had become a part of the realty. Until then it was his, and subject to levy for his debts. He had become insolvent when D. Hardin & Co. furnished the material. She knew that he was erecting this building as though it were his, though he was in fact erecting it for her. Both are occupying a part of it as a homestead, and living upon the income derived from the other. Both are thus enjoying the benefit of the identical property which was erected in part at the expense of his creditors. The transaction is abhorrent to equity and good conscience. Equity stamps it as fraudulent in fact, though not in intent, and will extend its arm to accomplish justice. The original interest of the wife will be protected.

The decree is reversed, and decree entered for complainants, with costs of both courts. The other justices concurred.

NOTE.—*Right of Creditors to Enforce a Lien or Follow Property Furnished the Debtor Where the Latter Has Expended it Upon His Wife's Property.*—We had difficulty in framing the subject of this annotation to our satisfaction, as we desire to limit it closely to the real question decided in the principal case,—a question of great importance. Probably we could not improve on the statement of the proposition here involved, furnished by the court in this case,—"can a person out of debt and solvent expend all his

means in improving his wife's property, and thus become insolvent, and leave creditors, who have trusted him for materials to be used in such improvements, without redress?" Upon the question as thus stated the court said counsel were able to find no authorities.

We must be careful to distinguish the question here to be discussed from the right of *existing* creditors to follow the property of their insolvent debtor who has expended his money in improving his wife's property. Thus, where a husband expends his money in building a house on his wife's land, it is a voluntary transfer of property, and, even though expended without fraudulent intent in fact, may be charged on such land for debts existing when such improvements were made. Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410. Many other authorities to the same effect and accessable to the profession have taken this question altogether out of the field of controversy. Nor must the particular question before us be confused with that other rule of law which denies the right of *subsequent* creditors to subject to their demands improvements made by an insolvent husband upon his wife's property. Thus, the mere fact that there is no consideration for the expenditure of money by the husband in erecting improvements on his wife's land does not entitle his subsequent creditors to subject the property to that extent to the payment of their claims, but they must prove an actual fraudulent intent. Caswell v. Hill, 47 N. H. 407; Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. Rep. 250.

A case quite analogous to the principal case is that of Hitchcock v. Kelly, 41 Conn. 611. In this case a husband purchased land and conveyed it to his wife, and immediately afterwards made a contract for the erection of a valuable house with persons to whom he represents that he is the owner of the land, his wife assenting to all his acts, upon which representations and the security of their lien such persons erect the building, and afterwards file a builder's lien therefor, which he resists on the ground that the premises belonged to his wife. The court held—first, that the money drawn from the savings bank was in law the money of the husband, and that he therefore paid for the land; second, that the taking of the conveyance to his wife was equivalent to a voluntary conveyance; third, that the facts showed an intent to defraud the petitioners in taking the title to the wife, and that the conveyance was therefore void as against them; fourth, that a decree of foreclosure should be granted against the husband and his wife, including interest on the debt from the time it became due. This case goes very far beyond the limits of the rule, as ordinarily stated in the cases, and can only be justified on the ground that the original conveyance of the land on which the improvements were made was in fact fraudulent as to *subsequent* creditors. If the land had belonged originally to the wife or if the husband had made the conveyance to her purely as a gift and without fraudulent intent to injure creditors, her original interest could not be touched by creditors, nor could any judgment run against her, and the creditors would be bound, as in the principal case, to bring a special action in the nature of a creditor's bill, in aid of the execution of its judgment against the husband, subjecting the property of their debtor in the improvements made, only to the extent, however, that they exceed the value of the wife's interest. This statement is well supported by a quotation from the argument of the court in the case of Holden v. Crump, 78 Tenn. (10 La.) 320: "A wife can only part with the title to lands held by her to her sole and separate use, in the mode prescribed by statute. If, therefore, the husband put improvements on land so held at his own expense, he cannot claim compensation from her or her heirs, although the work be done with her knowledge and consent. Nor can a mechanic acquire a lien on the land, under the statute in his favor, for work and labor and materials furnished by contract with the husband alone. Knott v. Carpenter, 3 Head (Tenn.), 542. The same is true even if the wife see the work in progress and give directions how it shall be done, unless indeed she join in the contract." Further on, however, the court says: "In a clear case of fraudulent participation on the part of the wife in the investment, the rule might be otherwise, she being secured, out of the proceeds of sale, the value of the land without the improvements." In Smith's Adm'rs v. Poythress, 2 Fla. 92, 48 Am. Dec. 176, it was held that where a husband gave his individual notes for the value of improvements made on his wife's separate estates, which he held in *charge and trust*, and the wife assented to and acknowledged the improvements and the debts, and the husband became insolvent, it was held that in equity, the separate estate of the wife was liable for the debts, and that the creditors of the husband were entitled to the same equity which he would have had, had he paid the debts.

As to the right of contractors or material men to enforce their liens upon the property of the wife, where their services or material have been used, under contract with the husband, to improve his wife's property, the authorities agree with the position taken by the principal case that the lien being a statutory proceeding cannot be enforced against the wife's separate estate unless she joined in the contract. Thus, it was held that even where a wife consented that her husband should, at his own expense, build houses on land held by her to her separate use, the contractor who furnished the materials and built the houses, supposing that the husband was the owner, was not entitled to a lien under the Mechanic's Lien Act. Huntley v. Holt, 58 Conn. 445, 20 Atl. Rep. 469, 9 L. R. A. 111. See also: Groth v. Stahl, 3 Colo. App. 8, 30 Pac. Rep. 1051; Lyon v. Champion, 62 Conn. 75, 25 Atl. Rep. 392; Campbell v. Jacobson, 145 Ill. 389, 34 N. E. Rep. 39; Fetter v. Wilson, 51 Ky. 90; Garnett v. Berry, 3 Mo. App. 197; Dearie v. Martin, 78 Pa. 55.

JETSAM AND FLOTSAM.

A SAMPLE OF LEGAL ETHICS.

An ex-county judge in one of the small towns of Wisconsin has placed the following card in his county paper to the consternation of his fellow-members of the profession:

"Real Estate and Probate Law.—Has it occurred to you that many a fortune has been lost to the rightful owners by bad management of estates and want of experience in the preparation of wills; and do you realize that 12 years of exclusive attention to that class of business, as county judge, may be of great value to you?

Having withdrawn from the general law practice I shall henceforth give my exclusive attention to probate matters, conveyancing and foreclosure proceedings, and having established my office at my residence near the court house, my expenses are reduced to a minimum, so that I can make charges absolutely satisfactory.

Kindly give me a trial, and I will save money and trouble to you and those dependent upon you."

Is this a violation of legal ethics? Let our readers debate the question.

ORNAMENTS AS FIXTURES.

The decisions in England on the subject of fixtures annexed to the freehold for the purpose of ornament are very conflicting. An early case, Herlakenden's Case, 2 Coke, 443, expressly denied the right to remove fixtures put up for the purpose of ornament, while Squier v. Mayer, 2 Freem. 249, on the other hand, gave to an executor, hangings nailed to the walls, and a furnace fixed to the freehold and purchased with the house. In Cave v. Cave, 2 Vern. 508 (1705), pictures put up as wainscot were held a part of the realty, Lord Keeper saying, "the house ought not to come to the heir maimed and disfigured." Just one year after this decision, Beck v. Rebow, 1 P. Wms. 94, was decided. This case held that a covenant to convey a house and all things affixed to the freehold did not include hangings and looking glasses fixed to the walls with nails and screws, and which were placed as wainscot, there being no wainscot beneath.

In D'Eyencourt v. Gregory, L. R. 3 Eq. 382 (1866), it was held that tapestries and pictures in panels, which were essentially a part of the house, attached to the walls by a tenant for life, however fastened, were fixtures and could not be removed. To the same effect was Norton v. Dashwood (1896), 2 Ch. 497.

Leigh v. Taylor, 86 L. T. R. 239, brings up this question once more. A tenant for life, for the purpose of decorating the walls of a mansion-house, fixed small strips of wood by means of nails and screws to the walls and nailed canvass to them. He then fastened tapestries to the canvass by very small tacks and fixed mouldings around the strips of wood by thin nails and screws, some of which penetrated the face of the wall. The tapestries became an essential feature to the general scheme of decoration. The house of lords, however, held that these tapestries, being fixed for the purpose of ornament in the only way in which it was possible to use and enjoy them as such, remained part of the personal estate, and did not pass to the remainderman.

The true criterion of an immovable fixture consists in the united application of several tests: 1. Real or constructive annexation to the realty. 2. Adaption to the use or purpose of that part of the realty with which it is connected. 3. Intention to make the article a permanent accession to the freehold. Ewell on Fixtures, p. 23. The tendency of modern authority seems to be to give pre-eminence to the question of intention, the other tests deriving their chief value as evidence of such intention.

The house of lords did not hesitate to follow this tendency. It maintained that whether or not a chattel is so annexed to the freehold as to be intended as an improvement to it and to pass with it, or is annexed only for the purpose of temporary ornament, is to be derived from the facts of each particular case. No rule can be laid down which will in itself solve the question. Yet the law as to ornamental fixtures does not change. It is the same now as it was in former times. The apparent change of law is due to the change in the mode of living, the increase of luxury making things matter of ornament which were not so in earlier days.

That the tapestry was never intended to remain a part of the house is evident from the nature of the attachment, the extent and degree of which was as slight as the nature of the thing would admit. Since the intention was to put up the tapestry for ornamentation, and for the enjoyment of the person while occupying the house, it is not under these circumstances a part of the house.

There are American cases very similar to Leigh v. Taylor, although they are not identical, which hold that ornamental fixtures constitute a part of the realty. In Columbia Insurance Co. v. Kneisley, 9 Ohio Dec. 432, a bookcase and a hatrack built into a room of a house, and which if removed would also remove a part of the base-boards around the floor of the room, were held a part of the realty. Mirrors set in the wall of a dwelling house, the removal of which would leave the walls unfinished, cannot be removed. Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

BOOKS RECEIVED.

A Treatise on the Law of Real Property. By John G. Hawley and Malcolm McGregor, Authors of "Hawley and McGregor on Criminal Law." Second Edition. The Sprague Publishing Co., Detroit, Mich., 1903. Sheep, pp. 600. Price $4.50. Review will follow.

HUMOR OF THE LAW.

In Mississippi, recently, a negro was charged with the murder of a woman of his own race. The jury went out at the close of the case and returned in a few moments with their verdict, finding the defendant guilty of manslaughter. As the clerk was reading the paper upon which for a few moments the life of the defendant seemed to hang in the balance, the negro sat gazing with breathless attention. No sooner, however, did he hear the word "manslaughter" than, springing to his feet, he exclaimed: "Jedge, dat wasn't no man I kilt; dat was only a woman," and his face showed the disgust that he evidently felt as having been found guilty of manslaughter when, as he said, he had "only kilt a woman."

Justice Giegerich was hurrying through City Hall Park the other morning to take his place on the bench, when a seedy-looking man doffed his hat and said:

"Will your Honor hear me?"

"Haven't time," replied the Justice.

"I wish to make a motion," presisted the beggar.

"What is it?" asked his Honor.

"That the court direct Mr. Giegerich to give me the price of a breakfast," said the man blandly.

"Can't you settle that out of court?" laughed the Justice, amused at the novelty of the beggar's method.

"It seems that the opposition prefers to litigate the question," replied the vagrant.

"Then the court will deny the motion."

"With costs to the defendant?"

"Yes," said the Justice, producing a quarter.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

ALABAMA.....5, 11, 101, 117, 121, 166
KENTUCKY 37, 48, 58, 69, 74, 92, 98, 108, 159, 164, 169, 172

LOUISIANA, 8, 24, 31, 40, 41, 49, 56, 59, 64, 104, 111, 123, 130, 150, 170
MISSISSIPPI..... .....12, 22, 26, 55, 68, 95, 133, 137
MISSOURI, 10, 23, 25, 27, 33, 35, 57, 60, 70, 77, 87, 97, 103, 106, 109, 122, 138, 141, 142, 157, 168, 175
NEW YORK, 2, 13, 14, 15, 16, 21, 28, 29, 34, 38, 42, 45, 47, 50, 62, 66, 67, 81, 89, 93, 105, 110, 112, 116, 120, 124, 126, 127, 131, 152, 135, 136, 139, 146, 152, 156, 160, 167, 171, 173, 174
NORTH CAROLINA, 4, 9, 30, 44, 51, 61, 82, 90, 91, 107, 125, 148, 161, 162
TENNESSEE..... 100
TEXAS, 1, 32, 36, 53, 54, 71, 78, 96, 99, 102, 113, 114, 115, 119, 143, 144, 147, 151, 163
UNITED STATES C. C., 7, 52, 65, 75, 79, 83, 85, 86, 94, 129, 153, 154, 165
UNITED STATES C. C. OF APP., 6, 39, 46, 63, 72, 73, 76, 80, 118, 140, 145, 149, 155, 158
UNITED STATES D. C.....3, 17, 18, 19, 20, 43, 84, 88, 128, 134

1. ACCIDENT INSURANCE — Assumption of Fact. — Recovery can be had on an accident policy for death, where the accidental injury causes rheumatism, and this produces death.—Travelers' Ins. Co. v. Hunter, Tex., 70 S. W. Rep. 798.

2. ACTION — Waiver. — Objection that the action is prematurely brought is waived by stipulation for reference of issues.—Lake v. Anderson, 78 N. Y. Supp. 444.

3. ADMIRALTY—Injury in Service.—An American court of admiralty will entertain an action by a seaman against a foreign ship to recover damages for the failure of the master to furnish him proper care and treatment after an injury in the service, where he would otherwise be without an effective remedy. — The Troop, U. S. D. C., D. Wash., 118 Fed. Rep. 769.

4. ADVERSE POSSESSION — Interruption. — A party claiming title by adverse possession cannot derive any benefit from the possession of a third party, where he fails to connect himself with such third party's title.—Johnston v. Case, N. Car., 42 S. E. Rep. 957.

5. ADVERSE POSSESSION — Limitations. — Husband occupying wife's lands for 10 years after her death and under claim of title acquires perfect title free of any trust.—Lide v. Park, Ala., 30 So. Rep. 175.

6. AGRICULTURE — Negligence of Lessee. — A state fair association, having let a portion of its ground to an exhibitor and advertised the exhibit as one of the attractions of the fair, held liable for injuries to a spectator caused by the exhibitor's negligence: — Texas State Fair v. Brittain, U. S. C. C. of App., Fifth Circuit, 118 Fed. Rep. 713.

7. ALIENS — Citizenship. — A native of Porto Rico did not become a citizen of the United States by virtue of the treaty of Paris or Act April 12, 1900, providing for the government of the island, and is subject to all the provisions of law regulating the admission of aliens into the United States. — *In re* Gonzalez, U. S. C. C., S. D. N. Y., 118 Fed Rep. 941.

8. APPEAL AND ERROR — Dismissal.—In a suit by a city to enforce the obligation of a railroad company, under an ordinance conferring franchise rights, cause remanded for further evidence.—New Orleans, S. F. & L. R. Co. v. City of New Orleans, La., 33 So. Rep. 192.

9. APPEAL AND ERROR — Instructions. — Whether instructions were too favorable to the defendant will not be reviewed where plaintiff does not appeal.—Fitzgerald v. Alma Furniture Co., N. Car., 42 S. E. Rep. 946.

10. ARBITRATION AND AWARD — Hearing Counsel.—It is within the discretion of arbitrators to refuse to hear counsel for the parties.—Pennsylvania Iron Works Co. v. East St. Louis Ice & Cold Storage Co., Mo., 70 S. W. Rep 903.

11. ARBITRATION AND AWARD — Objections. — A party going into the arbitration after the refusal of the arbitrators to be sworn or to admit counsel waives the objection thereto.—Gardner v. Newman, Ala., 33 So. Rep. 179.

12. ARSON — Maliciously. — On a trial for arson, an instruction, stating the facts necessary to constitute the offense, which omitted the word "maliciously," held erroneous.—Boone v. State, Miss., 33 So. Rep. 172.

13. ATTACHMENT—Junior Attaching Creditor.—A junior attaching creditor held not entitled to an order setting aside a sale under a senior attachment and directing a resale.—Levi v. Goldberg, 78 N. Y. Supp. 867.

14. ATTACHMENT — Service.—Motion to set aside service of attachment on one claimed to be indebted to the defendant in the attachment, on the ground that he is not indebted, will not lie.—Weil v. Gallun, 78 N. Y. Supp. 800.

15. BANKRUPTCY — Attachment. — A state court, in attachment, ought not to make an order setting aside a sale thereunder and directing a resale, where a federal court in bankruptcy proceedings has issued an order restraining further proceedings in the attachment action. — Levi v. Goldberg, 78 N. Y. Supp. 867.

16. BANKRUPTCY — Conveyances by Bankrupt. — In an action against defendant for goods received from a bankrupt under a void bill of sale, a judgment for the goods admitted to have been received, and for goods held sustained by the evidence.—Frank v. Musliner, 78 N. Y. Supp. 869.

17. BANKRUPTCY — Exemptions. — Under the laws of Pennsylvania, the exact property which a bankrupt desires to retain under a state exemption must be set out in the schedule, which may be amended, if this is not sufficiently done. — *In re* Duffy, U. S. D. C., M. D. Pa., 118 Fed. Rep. 926.

18. BANKRUPTCY — Preferences. — Creditors whose claims have been rejected in a bankruptcy proceeding by reason of their having received an innocent preference held entitled to a surplus as against the bankrupt after paying unpreferred claims. — *In re* Morton, U. S. D. C., D. Mass., 118 Fed. Rep. 908.

19. BANKRUPTCY—Proof of Claim.—A mortgagee of the bankrupt, seeking by intervention to have the proceeds of the mortgaged property applied on his debt, held not required to prove his claim and have it allowed as provided by Bankr. Act 1898, §§ 57, 65a U. S. Comp St. 1901, pp. 3443, 3448.—*In re* Goldsmith, U. S. D. C., N. D. Tex., 118 Fed. Rep. 763.

20. BANKRUPTCY — Sale of Mortgaged Property. — A referee in bankruptcy may direct the manner of sale of property of a bankrupt estate free from liens and incumbrances, preserving and transferring *bona fide* liens thereon to the proceeds of the sale.—*In re* Waterloo Organ Co., U. S. D. C., W. D. N Y., 118 Fed. Rep. 904.

21. BILLS AND NOTES—Accommodation.—The maker of an accommodation note held not liable to a bank holding the same as collateral for any debt contracted after its maturity. — Riverside Bank v. Jones, 78 N. Y. Supp. 825.

22. BILLS AND NOTES—Co-Maker. — A person who, at request of a debtor, signed his note on the back, held a co-maker.—Pearl v. Cortright, Miss., 33 So. Rep. 72.

23. BILLS AND NOTES — Sale of Note.— Where one not under obligation to pay a past-due note pays to the holder the amount thereof, and receives the uncanceled note indorsed in blank, the transaction is a purchase, and not payment.—Marshall v. Meyers, Mo., 70 S. W. Rep. 927.

24. BOUNDARIES — Courses and Distances. — In a controversy over surveys and other boundary lines, courses and distances yield to natural and ascertained objects.—Leonard v. Forbing, La , 32 So. Rep. 203.

25. BUILDING AND LOAN ASSOCIATIONS — Usury. — Where, on a loan from a building association, the sums withheld were either actual premiums, because fixed by competition, or constructive interest, because not thus fixed, in either case, if they fall within the classification of interest, the loans are not usurious, unless the entire interest charged exceeds what may be stipulated in writing.—Laidley v. Cram, Mo., 70 S. W. Rep. 912.

26. BURGLARY — Indictment.— Where the building in which a burglary was committed was leased and occupied by a tenant, the indictment may properly charge

the ownership as in such tenant.— Brown v. State, Miss., 33 So. Rep. 170.

27. BURGLARY—Possession of Property. — Possession of stolen property three days after its taking is sufficient to raise a presumption of guilt. — State v. Armstrong, Mo., 70 S. W. Rep. 874.

28. CARRIERS—Assault on Passenger.—A street railway company is liable for the willful assault of its conductor on a passenger.—Willis v. Metropolitan St. Ry. Co., 78 N. Y. Supp. 478.

29. CARRIERS—Bills of Lading.— Carrier held liable on through bill of lading for loss of goods by fire.—Robinson v. New York & T. S. S. Co., 78 N. Y. Supp. 359.

30. CARRIERS—Negligence.— The presumption of negligence arising from the derailment of a train is not rebutted by the fact that the derailment was caused by a slide of rocks on the track.—Thomas v. Southern Ry. Co., N. Car., 42 S. E. Rep. 964.

31. CARRIERS — Negligence of Passenger. — A person stepping off a moving street car assumes the risk of injury, in the absence of negligence on the part of the carrier. — Jones v Canal & C. R Co., La ,33 So. Rep. 200.

32. CARRIERS—Stolen Property. — A sleeping car company is liable for property lost by occupants of the car only when it is shown to have been negligent, or that its servant in charge purloined the property. — Pullman Sleeping Car Co. v. Hatch, Tex , 70 S W. Rep. 771.

33. CARRIERS—What Constitutes.—A storage company, employed to move household effects from one house in a city to another, is not a common carrier having a lien on the property moved.—Thompson v. New York Storage Co., Mo., 70 S. W. Rep. 988

34. CEMETERIES—Removal of Bodies. — Laws 1898, ch. 543, §§ 4, 5, amending Laws 1869, ch. 727, held not to authorize the heirs of a widow, whose body was interred in the general part of the cemetery of a religious corporation, and not in a family lot, to remove her body without the consent of the corporation. — *In re* Cohen, 78 N. Y. Supp. 417.

35. CERTIORARI—Record.— *Certiorari* brings up for review only such facts as appear from the face of the record, and which go to the jurisdiction, and no other facts can be reviewed.—State v. Baker, Mo., 70 S. W. Rep. 872.

36. CHATTEL MORTGAGES—Lien.—Mortgagees of chattels held not barred from enforcing the lien against one converting the chattels, though not intervening in action by the owner for conversion.—Scott v. Cox, Tex., 70 S. W. Rep. 802.

37. COMMERCE — Constitutional Law.—Ky. St. § 841, requiring foreign railroad corporations to file their articles of incorporation in the state, and providing that they thereby become resident corporations, is not contrary to the interstate commerce clause of the federal constitution.—Davis' Adm'r v. Chesapeake & O. Ry. Co., Ky., 70 S. W. Rep. 857.

38. COMPROMISE AND SETTLEMENT — Consideration.— Payment of less than the full amount of a disputed claim held a sufficient consideration for an agreement to discontinue action. — Rosenthal v. Rudnick, 78 N. Y. Supp. 415.

39. COMPROMISE AND SETTLEMENT—Receiver for Partnership. — A third person, who had joined in an agreement looking to settlement of matters relating to partnership assets out of court, held not to have any standing to oppose the appointment of a receiver for a partnership in a suit between the partners.—McKechney v. Weir, U. S. C. C. of App., Seventh Circuit, 118 Fed. Rep. 805.

40. CONSTITUTIONAL LAW—Subsequent Legislation.—A person charged with an offense cannot be deprived of the benefit of a law applicable thereto enacted after its commission even before his conviction and sentence. —Theus v. Edwards, La., 33 So. Rep. 209.

41. CONTRACTS—Breach.—A passive violation of a contract cannot be taken advantage of without allegation and proof of the things not done. — City of Alexandria v. Morgan's Louisiana & T. R. & S. S. Co., La., 33 So. Rep. 65.

42. CONTRACTS — Consideration.—An express promise to repay plaintiff money voluntarily paid to defendant's creditor without defendant's request held without consideration.—Thomson v. Thomson, 78 N. Y. Supp. 389.

43. CORPORATIONS — Bonds. — A corporation having power to issue bonds may, in the absence of express restriction, pledge the same for money borrowed for legitimate purposes. — *In re* Goldville Mfg. Co., U. S. D. C., D. So. Car., 118 Fed. Rep. 892.

44. CORPORATIONS—Confession and Avoidance.—In an action against a corporation on a contract, the defense that the contract is *ultra vires* is in the nature of confession and avoidance.—Lewis v. Clyde S. S. Co., N. Car., 42 S. E. Rep. 969.

45. CORPORATIONS—Eligibility of Trustees.—A resolution of a corporation that only citizens should be eligible as trustee, not incorporated in the by-laws, held revocable at any time.—Sorrentino v. Giletti, 78 N. Y. Supp 322.

46. CORPORATIONS — Mandamus.—A state law prohibiting the granting of a *mandamus* for the collection of judgments against a city is not binding on a federal court. —United States v. Capdevielle, U. S. C. C. of App., Fifth Circuit, 118 Fed. Rep. 809.

47. CORPORATIONS — Stock.—As against the true owner of a certificate of stock, a purchaser must show he took without notice for value. — American Press Ass'n v. Brantingham, 78 N. Y. Supp. 305.

48. CORPORATIONS—Stock.—A subscription to the stock of a corporation cannot be rescinded, where the corporation is defunct and has passed into insolvency before commencement of the action to rescind. — Deppen v. German-American Title Co., Ky., 70 S. W. Rep. 868.

49. COSTS — Appeal From Justice Court. — Where, on appeal to the district court, a judgment of a justice has been affirmed or altered to the disadvantage of the appellant, he should pay the costs. —State v. Miller, La., 33 So. Rep. 211.

50. COURTS—Taxation of Costs.—The appellate division, in which exceptions have been ordered, heard in the first instance, cannot pass upon a motion for an extra allowance.—Riverside Bank v. Jones, 78 N. Y. Supp. 325.

51. COVENANTS—Breach.—A grantee without warranty of title from his immediate grantor can maintain an action against a prior grantor with warranty, on eviction by a title paramount to that of the warranting grantor.— Ravenel v. Ingram, N. Car., 42 S. E. Rep. 967.

52. CREDITORS' SUIT—Expense of Litigation.—An order in a creditors' suit for creditors who had proved their claims to contribute to expense of litigation or have their claims stricken out held proper —Chick v. Northwestern Shoe Co., U. S. C. C., N. D. Ill., 118 Fed. Rep. 983.

53. CRIMINAL LAW — Confession. — The warning to accused, required by statute as a predicate for use of his confession, need not include the information that he cannot be compelled to make a statement.—Hill v. State, Tex., 70 S. W. Rep. 754.

54. CRIMINAL LAW — Objectionable Remarks. — A remark of a prosecuting attorney in trial for rape, condemning the crime rather than the defendant, and promptly reprimanded by the judge, held not to be ground for reversal.—Fredericson v. State, Tex., 70 S. W. Rep. 754.

55. CRIMINAL LAW — Sentence. — Where the statute limits the penalty for a certain misdemeanor to 20 days' imprisonment, the court has no power to sentence a person convicted thereof to 30 days' imprisonment.—Stark v. State, Miss., 33 So. Rep. 175.

56. CRIMINAL TRIAL — Newly Discovered Evidence.— Accused, on discovery of new witnesses, having failed to ask for a temporary postponement, is not in a position to claim a new trial to obtain the evidence of such witnesses.—State v. Albert, La., 33 So. Rep. 196.

57. DAMAGES—Compensatory. — A verdict for plaintiff for one cent punitive damages, not based on any compensatory damages, held erroneous.— Hoagland v. Forest Park Highlands Amusement Co., Mo., 70 S. W. Rep. 878.

58. DAMAGES—Excessiveness of Verdict.—A verdict for $897 for injuries to a woman aged near 60 years was not excessive, on evidence that she had permanently lost the use of her right arm.—Illinois Cent. R. Co. v. Taylor, Ky., 70 S. W. Rep. 825.

59. DAMAGES — Landlord and Tenant. — Tenants are without right to damages on a lease containing a stipulation of renewal, where they never avail themselves of it.—Jackson v. Doll, La., 33 So. Rep. 207.

60. DAMAGES—Loss of Time.—In an action for personal injuries, it is error to direct an award of damages for plaintiff's loss of time, if no testimony as to such value was introduced. — Stoetzle v. Sweringen, Mo., 70 S. W. Rep 911.

61. DAMAGES—Physical Injury. — An action will lie for physical injury resulting from fright or nervous shock caused by negligence.—Watkins v. Kaolin Mfg. Co., N. Car., 42 S. E. Rep. 983.

62. DEDICATION — Abandonment.—Land conveyed to the trustees of a town for a street, on its abandonment, reverts to the grantor. — Downes v. Dimock & Fink Co., 78 N. Y. Supp. 348.

63. DEPOSITIONS — De Benne Esse.—A deposition of a witness residing in Minnesota when it was taken, held properly received on the trial of an action in Texas, without proof that the witness was not within 100 miles of the place where the court sat, as required by Rev. St. § 865, U. S. Comp. St. 1901, p. 663. — Texas & P. Ry. Co. v. Reagan, U. S. C. C. of App., Fifth Circuit, 118 Fed. Rep. 815.

64. DESCENT AND DISTRIBUTION — Acceptance of Succession.—The written declaration or admission of the capacity of heirship by the descendants of a dead man do not constitute an acceptance of the succession.—Griffin v. Burris, La., 33 So. Rep. 201.

65. DISMISSAL AND NONSUIT—Failure as to Certain Defendants.—The structure of a bill and its specific prayer, showing that substantial relief was sought only of certain defendants, held that, failing as to them, it cannot be retained as to another, joined merely to cut off his rights.— McKay v. Hudson, U. S. C. C., S. D. N. Y., 118 Fed. Rep. 919.

66. DISMISSAL AND NONSUIT—Reservation.—Stipulation referring issues held not to reserve the right to move to dismiss complaint on the ground that the action proved does not conform to the pleadings. Lake v. Anderson, 78 N. Y. Supp. 444.

67. DIVORCE — Alimony Pending Appeal. — Where alimony is awarded in a decree of separation, the trial court has power to award alimony and counsel fees to the plaintiff pending stay by appeal.—Haddock v. Haddock, 78 N. Y. Supp. 804.

68. EJECTMENT—Tax Sale. — A defendant in ejectment cannot show that plaintiff, purchaser at a tax sale, was incapacitated to purchase. — Graham v. Warren, Miss., 33 So. Rep. 71.

69. ELECTIONS—Ballot.— Where a ballot was marked under both party devices, and also opposite contestant's name, the vote should be counted for contestant alone. —Edwards v. Logan, Ky., 70 S. W. Rep. 852.

70. ELECTRICITY — Street Railway. — The right of an electric street railway to occupy the street with poles, wires, etc., cannot be transferred to one who does not own the street railway franchise, nor operate the road under it.—City of Carthage v. Carthage Light Co., Mo., 70 S. W. Rep. 936.

71. EMBEZZLEMENT — Statement by Accused. — In a prosecution for embezzlement, admission of evidence of accused's statement that he was going to sell his principal's land and then take care of her, held not ground for reversal. — Jackson v. State, Tex., 70 S. W. Rep. 760.

72. EQUITY—Cross-Bill. — A refusal to allow the filing of an amended cross-bill after a hearing before a master on the issues joined on the original cross-bill held to have been within the discretion of the court.— Ferguson Contracting Co. v. Manhattan Trust Co., U. S. C. C. of App., Sixth Circuit, 118 Fed. Rep. 791.

73. EQUITY—Dismissal Without Prejudice. — The propriety of permitting a plaintiff to dismiss his bill without prejudice is within the discretion of the court.—Ebner v. Zimmerly, U. S. C. C. of App., 118 Fed. Rep. 818.

74. EQUITY—Fraudulent Sale.— Defrauded purchaser of corporate stock held liable on the purchase-money notes to the extent of the excessive salary paid him as an employee in consequence of the purchase. — Deppen v. German-American Title Co , Ky., 70 S. W. Rep. 868.

75. EQUITY—Limitations.—State statutes of limitations, while relevant in federal courts of equity on an issue of laches, are not binding on such courts.—Potts v. Alexander, U. S. C. C., W. D. N. Y., 118 Fed. Rep. 885

76. EQUITY — Overruling of Plea.—Under the decisions of the supreme court, applying equity rule 24, defendant may answer after an issue of fact joined on a plea has been determined against him — Westervelt v. Library Bureau, U. S. C. C. of App., First Circuit, 118 Fed. Rep. 824.

77. ESTOPPEL — Pleading.—An estoppel *in pais* must be pleaded. — City of Carthage v. Carthage Light Co., Mo., 70 S. W. Rep. 936.

78. EVIDENCE — Accident Insurance. — That one's death was caused by accidental injury may be shown, though he did not inform his physician of the accident.— Travelers' Ins. Co. v Hunter, Tex., 70 S. W. Rep. 798.

79. EVIDENCE — Judicial Notice. — Federal court does not take judicial notice of the rules of the courts of the state in which it is sitting. — Randall v. New England Order of Protection, U. S. C. C., D. Vt., 118 Fed. Rep. 782.

80. EVIDENCE — Parol Agreement.—A parol agreement cannot be shown to add new and distinct conditions to a written contract made between the parties subsequently or at the same time, where neither fraud nor mistake is shown. — Ferguson Contracting Co. v. Manhattan Trust Co., U. S. C. C. of App., Sixth Circuit, 118 Fed. Rep. 791.

81. EVIDENCE — Presumption of Ownership. — Declarations of a judgment debtor that money deposited by a third party in lieu of bail for him when arrested in a civil action belonged to him were receivable only as against him, and were not evidence as against the other defendants.—Finelite v. Sonberg, 78 N. Y. Supp. 339.

82. EXECUTION — Mixed Equitable Estate. — Where an owner of land made a mortgage deed thereof to another, who subsequently conveyed to H, held, that a sale of the land on an execution against H passed no title. — Johnston v. Case, N. Car., 42 S. E. Rep. 957.

83. EXECUTORS AND ADMINISTRATORS — Description of Property.—A complaint by an administrator held not objectionable for failure to show the date of her intestate's death. — Stanley v. Sierra Nevada Silver Min. Co., U. S. C. C., D. Nev., 118 Fed. Rep. 981.

84. FALSE PRETENSES — Month's Lodging.—A month's lodging is a valuable thing, within the meaning of 1 Supp. Rev. St. p. 425, U. S. Comp. St. 1901, p. 3679, providing against obtaining any "valuable thing" by impersonating a United States officer. — United States v. Ballard, U. S. D. C., W. D. Mo., 118 Fed. Rep. 757.

85. FEDERAL COURTS — Diversity of Citizenship. — A federal court is without jurisdiction of a suit to restrain action by a partnership, where some of the partners are citizens of the same state as complainant. — Raphael v. Trask, U. S. C. C., S. D. N. Y., 118 Fed. Rep. 777.

86. FEDERAL COURTS — Federal Question. — A suit to enjoin a city from shutting off a supply of electricity furnished to a street railroad company under a contract held to be within the jurisdiction of a federal court.— Riverside & A. Ry. Co. v. City of Riverside, U. S. C. C., S. D. Cal., 118 Fed. Rep. 736.

87. FINDING LOST GOODS — False Arrest. — Where an article found in a place of amusement had been lost, an

instruction that the proprietor could demand it from the finder, and, if refused, eject him from the premises, was erroneous. —Hoagland v. Forest Park Highlands Amusement Co., Mo., 70 S. W. Rep. 878.

88. FIXTURES—Cotton Mill.—Machinery in a cotton mill held to be a fixture, and to pass under a mortgage as a part of the realty. — *In re* Goldville Mfg. Co., U. S D. C., D. S. Car., 118 Fed Rep. 892.

89. FRAUDS, STATUTE OF — Agreement to Convey Land. — A stipulation giving lessee the privilege of purchasing the leased premises and the land of the lessor "adjoining on the east" held to sufficiently describe the land adjoining on the east. — Heyward v. Wilmarth, 78 N. Y. Supp. 347.

90. FRAUDS, STATUTE OF — Unilateral Signature. — A contract for the sale of land not signed by the vendee, and under which he has gone into possession, cannot be enforced against the vendee.—Love v. Atkinson, N. Car., 42 S. E. Rep. 966.

91. GAMING — Place of Offense.—The keeping of a place, elsewhere than at a race track, with paraphernalia for registering bets, held not taken out of Pen. Code, § 351, by the exceptions therein, taken in connection with section 343, Pen. Code, and Laws 1895, ch. 570, § 17. — People v. Stedeker, 78 N. Y. Supp. 516.

92. GIFTS — Consideration.—A note executed by decedent to his son as a gift cannot be enforced against decedent's estate, as against a plea of no consideration by decedent's heirs. — Callender's Admr. v. Callender, Ky., 70 S. W. Rep. 844.

93. GUARANTY — Foreclosure of Mortgage.—With leave of court required by Code Civ. Proc. § 1628, held that action for deficiency can be maintained against the guarantor of payment of a mortgage, after action against the grantee of the mortgaged premises alone to foreclose.—Shipman v. Niles, 78 N. Y. Supp. 440.

94. HABEAS CORPUS — Conflict of Authority. — Though the United States courts can intervene by *habeas corpus* where a disregard of the federal law is charged, it is not always expedient to do so, because involving a conflict of authority. — *Ex parte* Rearick, U. S. C. C., M. D. Pa., 118 Fed. Rep.928.

95. HIGHWAYS—Contract Law.—Where the supervisors of a county adopted the contract road law, but did not comply with its essential provisions, there could be no legal delinquency in failing to pay a road tax.—State v. Edwards, Miss., 33 So. Rep. 172.

96. HOMESTEAD — Deed of Trust.—Grantor in deed of trust of a homestead held not estopped to assert that the property was his homestead.—Letzerich v. Lidiak, Tex., 70 S. W. Rep. 773.

97. HOMICIDE—Admissibility of Evidence.—Physician's evidence as to nature of wound held admissible in prosecution for assault with intent to kill.—State v. Hamilton, Mo., 70 S W. Rep. 876.

98. HOMICIDE—Evidence.—It was competent for a witness to testify that on the day before the homicide he heard the defendant say, without mentioning deceased's name, "I will kill the God damned son of a bitch before sundown." — Barnes v. Commonwealth, Ky., 70 S W. Rep. 827.

99. HOMICIDE—Former Assaults.—On prosecution of a wife for killing her husband, she having testified that he attempted to strike her with a hoe, it was error to exclude evidence that he had on former occasions brutally assaulted her and threatened her life.—Williams v. State, Tex., 70 S. W. Rep. 756.

100. HUSBAND AND WIFE—Lex Fori.—A note signed by a married woman residing with her husband in the state, but delivered in Ohio and payable there, is a contract of that state. — First Nat. Bank v. Shaw, Tenn., 70 S. W. Rep. 807.

101. HUSBAND AND WIFE — Power to Foreclose Mortgage. — Where a power to foreclose a mortgage was bestowed on a wife before her marriage, she was capable of executing it afterwards without her husband's cooperation.—Lide v. Park, Ala., 33 So. Rep. 175.

102. INFANTS — Assignment. — An assignment for the benefit of an infant creditor will be protected without his assent thereto being shown.—South Texas Nat. Bank v. Texas & L. Lumber Co., Tex., 70 S. W. Rep. 768.

103. INJUNCTION — Dissolution.—Dissolution of a temporary injunction to restrain prosecution of a replevin suit held proper, where defendant is not prosecuting it and it is unreasonable to presume he will. — Gipson v. Powell, Mo., 70 S. W. Rep. 935.

104. INNKEEPERS — Injury to Guest. — In an action against a hotel keeper, alleging that coffee furnished plaintiff's wife contained deleterious substances, whereby she became ill, and that, while sick therefrom, she was frightened by the insults of one of the waiters, evidence held to sustain verdict for defendant. — Stringfellow v. Grunewald, La., 33 So. Rep. 190.

105. INSANE PERSONS — Matter of Right. — Where one adjudged incompetent, and ordered to be confined, applied for release and discharge of her committee, she could not, after verdict against her, demand a discontinuance as a matter of right, before final order entered. —*In re* Larner, 78 N. Y. Supp. 326.

106. JUDGES — Criminal Law. — Under Rev. St. 1899, § 2597, when the regular judge is incompetent to try a criminal cause, he may call another judge without previous proceedings in the way of electing a special judge.—State v. Gilman, Mo., 70 S. W. Rep 943.

107. JUDGES—Salary Exempt.—Under Const. art. 4, § 23, the salaries of the chief justice and associate justices of the supreme court are exempt from taxation, either direct or otherwise —*In re* Taxation of Salaries of Judges, N. Car., 42 S. E. Rep. 970.

108. JURY — Excusing Without Challenge. — It was not error to grant the prosecuting attorney's request to excuse a juryman whom he wished to introduce as a witness.—Barnes v. Commonwealth, Ky., 70 S. W. Rep. 827.

109. JUSTICES OF THE PEACE—Docket.—The docket of a justice is evidence of the matters required by law to be stated therein, and of other proceedings had in the cause recited therein.—Heman v. Larkin, Mo., 70 S. W. Rep. 907.

110. JUSTICES OF THE PEACE — Service.—Refusal of a justice of the peace to receive evidence to impeach the service of the summons, held reversible error.—Burbanks Hardware Co. v Henkel, 78 N. Y. Supp. 365.

111. LANDLORD AND TENANT — Abandonment of Premises.—Lessees removing their stock in trade and surrendering the keys cannot claim damages for failure to renew the lease according to an option therein.—Jackson v. Doll, La., 33 So. Rep. 207.

112. LANDLORD AND TENANT — Defective Stairways.—Where the evidence of the sufficiency of a stairway on which plaintiff's intestate was killed would have authorized a verdict for defendant, an erroneous instruction that failure to comply with Tenement House Act, § 80, was negligence, was not harmless.—Ziegler v. Brennan, 78 N. Y. Supp. 342.

113. LARCENY—Evidence.— In a prosecution for theft, evidence held insufficient to support a conviction, because failing to show an exclusive right of possession in the alleged owner. — Tyler v. State, Tex., 70 S. W. Rep. 750.

114. LARCENY— Failure of Proof. — Where on a prosecution for the theft of the property of T F T, the record showed that the witnesses called the owner merely by his last name, there was a failure of proof.—Atkins v. State, Tex., 70 S. W. Rep. 744.

115. LARCENY — Title of Person Robbed.—If a party wins money, and it is in his exclusive possession, theft thereof may be committed by a third party.— Fay v. State, Tex., 70 S. W. Rep. 744.

116. LIBEL AND SLANDER—Complaint.—A complaint in which alleged slanderous words are specifically set out, followed by the words, "or words of like purport, meaning, and effect," held demurrable. — Drohan v. O'Brien, 78 N. Y. Supp. 430.

117. LIFE INSURANCE — After-Born Children.—Life insurance policies payable to the children of insured included children subsequently born as well as those in existence at the time of their issuance. — Roquemore v. Dent, Ala., 33 So. Rep. 178.

118. LIFE INSURANCE — Beneficiary. — The rights of a beneficiary under a life policy issued under Laws N. Y. 1877, ch. 321, § 1, relating to forfeitures for nonpayment of premiums, held not subject to a waiver by assured.—Mutual Life Ins. Co. v. Hill, U. S. C. C. of App., Ninth Circuit, 118 Fed. Rep. 708.

119. LIFE INSURANCE— Warranties.— False statements of insured that she had not been treated by a physician, except in childbirth, for 10 years, and had no disease of the liver, held warranties, and to void the policy, whether material or not. — Flippen v. State Life Ins. Co., Tex., 70 S. W. Rep. 787.

120. MANDAMUS—Producing Papers.—A stockholder in a corporation held not entitled to *mandamus* requiring it to produce its books and papers for his examination. —*In re* Latimer, 78 N. Y. Supp. 314.

121. MASTER AND SERVANT — Assumption of Risk. —An employee does not assume the risk created by the employer's negligence. — Alabama G. S. R. Co. v. Brooks, Ala., 33 So. Rep. 181.

122. MASTER AND SERVANT— Assumption of Risk. — An employee in a switchyard held to assume the risk in attempting, while going to the vault provided for such employees, to climb over the couplings of cars in a train standing ready to start. — McKee v. Chicago, B. & O. R. Co., Mo., 70 S. W. Rep. 922.

123. MASTER AND SERVANT—Civil Liability.—Employing a laborer already employed by another person will not create a liability on the part of the one employing him, unless it is done with some degree of threat, fraud, falsehood, deception, or benefit.—Kline v. Eubanks, La., 33 So. Rep. 211.

124. MASTER AND SERVANT—Damages.—Punitive damages are not recoverable against the master for the wrongful act of his servant, unless he has ratified the misconduct, or it is committed after the unfitness of the servant is known to the master.—Kastner v. Long Island R. Co., 78 N. Y. Supp. 469.

125. MASTER AND SERVANT — Employment of Infant.— In an action for injuries to an infant employed in a factory, it was not error to permit the father to testify that he did not hire plaintiff to defendant.—Fitzgerald v. Alma Furniture Co., N. Car., 42 S. E. Rep. 946.

126. MECHANIC'S LIEN—Trustee in Bankruptcy.—Bankrupts held entitled to file mechanic's lien and assign same to trustee in bankruptcy.— Davis v. Fidelity & Deposit Co. of Maryland, 78 N. Y. Supp. 336.

127. MORTGAGES—Foreclosure.— A mortgage sale held to divest the mortgagee of all rights, including that to forclosure against one not made a party, and to vest them in the purchaser. — Greene v. Mussey, 78 N. Y. Supp. 434.

128. MORTGAGES — Validity.— Delivery of a mortgage by a corporation to secure bonds held to have been sufficient to render it valid under the laws of South Carolina. —*In re* Goldville Mfg. Co., U. S. D. C., D. S. Car., 118 Fed. Rep. 892.

129. MUNICIPAL CORPORATIONS — Billboards.— City of Buffalo, under its charter, held authorized to pass a city ordinance prohibiting the erection of billboards of more than a specified height without consent of the common council, etc.—Whitmier & Filbrick Co. v. City of Buffalo, U. S. C. C., W. D. N. Y., 118 Fed. Rep. 773.

130. MUNICIPAL CORPORATIONS — City Engineer. — Assumption of authority by the city engineer to suspend a deputy engineer held not ground for an action in damages.—De Armas v. Bell, La., 33 So. Rep. 188.

131. MUNICIPAL CORPORATIONS—Leave of Absence.— City street sweepers having, in view of shortage in the appropriation, agreed to take leave of absence one day each week without pay, and having done so and receipted for their pay, held estopped to claim adversely to the agreement. — Downs v. City of New York, 78 N. Y. Supp. 442.

132. MUNICIPAL CORPORATIONS—Police.—A city charter providing conditions for discharge of a policeman, held not to prevent discharge because of lack of funds.—*In re* Lazenby, 78 N. Y. Supp. 802.

133. MUNICIPAL CORPORATIONS— Treasurer's Salary.— When a city has provided for the handling of a large amount of money not contemplated when the treasurer's rate of compensation was fixed, it may, by ordinance, reduce such rate.—City of Grenada v. Wood, Miss., 33 So. Rep. 173.

134. MUNICIPAL CORPORATIONS—Ultra Vires.—The acceptance by a city council of a bid for a franchise held *ultra vires*, and not to create a valid contract under the statute of California. — Pacific Electric Co. v. City of Los Angeles, U. S. D. C., S. D. Cal., 118 Fed. Rep. 746.

135. NEGLIGENCE—Licenses.—Precautions taken to exclude the public from an unfinished extension to a park held to have rendered children playing there but licensees at best. — Albert v. City of New York, 78 N. Y. Supp. 355.

136. NEW TRIAL — Absence of Witness. — One not protecting his rights at the trial because of surprise at absence of witness held not in a position to ask for new trial on account thereof. — Erichson v. Sidlo, 78 N. Y. Supp. 487.

137. OBSCENITY — Indictment. — An indictment under Code, § 1218, which charges that defendant did "unlawfully and willfully" expose his person in a public place, but does not allege that it was "lewdly" done, is fatally defective.—Stark v. State, Miss., 33 So. Rep. 175.

138. PARTIES—Contract. —Action for breach of contract to deliver goods to two persons cannot be waived by one of them. Both are necessary parties.—Lemon v. Wheeler Mo., 70 S. W. Rep. 924.

139. PARTITION — Confirmation. — Where plaintiff unsuccessfully applied for stay of a partition sale pending a suit by her, she could not maintain a bill to set aside the final judgment in partition after the successful prosecution of her suit. — Schwaman v. Truax, 78 N. Y Supp. 374.

140. PARTNERSHIP — Adverse Interest of Agent. — A member of a partnership has no interest in the specific proceeds of firm property sold by his partner, and no claim against a bank in which it was deposited by the seller to his own credit on account of such deposit.—Bank of Overton v. Thompson, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 798.

141. PARTNERSHIP—Sale of Stock.—A finding that a sale of the stock or merchandise was not absolute held conclusive on appeal. — Boon v. Turner, Mo., 70 S. W. Rep. 916.

142. PAYMENT — Accounting. — Where a check, reciting that it is in full payment of a specified demand, is received and cashed without objection, it is *prima facie* evidence of the payment and facts recited. — Gregg v. Roaring Springs Land & Mining Co., Mo., 70 S. W. Rep. 920.

143. PAYMENT—Unsecured Claim.—The application by a creditor of an unapplied payment to an unsecured rather than to a secured, debt, held not inequitable.—Thatcher v. Tillory, Tex., 70 S. W. Rep. 782.

144. PERPETUITIES—Testamentary Trust.—A provision in a will forbidding the alienation of trust property, except for purposes of reinvestment, held not an illegal restraint on alienation. — Dulin v. Moore, Tex., 70 S. W. Rep. 742.

145. POST OFFICE — Date of Offense. — An indictment under Rev. St. U. S. § 5480, U. S. Comp. St. 1901, p. 3696, charging a scheme to defraud by use of the mails and the mailing of letters in furtherance thereof, is sufficient, though the letters are not set out. — Hume v. United States, U. S. C. C. of App., Fifth Circuit, 118 Fed. Rep. 689.

146. PRINCIPAL AND AGENT — Apparent Authority. — A coachman held to have no implied or apparent authority

to have cost of transportation of team charged to the master.—Saugerties & N. Y. Steamboat Co. v. Miller, 78 N. Y. Supp. 451.

147. PUBLIC LANDS — Application to Purchase.—An applicant who files for the purchase of school land before the expiration of a lease thereof to another held entitlep thereto as against applicants filing after the award to him.—Smith v. Zesch, Tex., 70 S. W. Rep. 775.

148. PUBLIC LANDS — Grant from State.—Under Code, § 2786, a grant from the state cannot be set aside on the ground of fraud at the suit of a junior grantee.—Henry v. McCoy, N. Car., 42 S. E. Rep. 955.

149. PUBLIC LANDS—Prima Facie Evidence.—The tract of a local land office is *prima facie* evidence that the lands therein shown to be public lands are such. — Jessie D. Carr Land & Live Stock Co. v. United States, U. S. C. C. of App., Ninth Circuit, 118 Fed. Rep. 821.

150. RAILROADS — Duties and Powers. — The authority and duty of the railroad commission is not limited to matters concerning public safety or health, but extend to matters concerning public comfort and convenience.—Morgan's Louisiana & T. R. & S. S. Co. v. Railroad Commission of Louisiana, La., 33 So. Rep. 214.

151. RAILROADS — Passenger Station.—Rev. St. art. 4521, held not to require a carrier to keep its station open for the accommodation of the family of a passenger while the latter went 4 1-2 miles to obtain a conveyance.—International & G. N. R. Co. v. Pevey, Tex., 70 S. W. Rep. 778.

152. REFERENCE — Partnership. — In an action by a partner on a mortgage given to indemnify him against liability for firm debt's held, that the referee properly refused to consider accounts of the partners and the drawing of money from the firm.—Sternbach v. Friedman, 78 N. Y. Supp. 318.

153. REMOVAL OF CAUSES—Petition.—A petition for removal to a federal court, while filed in the state court, is transmitted as a part of the record, and is a pleading, on which the right of removal rests. — Randall v. New England Order of Protection, U. S. C. C., D. Ver., 118 Fed. Rep. 782.

154. REMOVAL OF CAUSES—Record.—Where the record on removal of a cause is insufficient to confer jurisdiction on the federal court, it has no power to grant an amendment of the removal petition.—Dalton v. Germania Ins. Co., U. S. C. C., N. D. Iowa, 118 Fed. Rep. 936.

155. SHIPPING—Breach of Contract.—That a barge had become disabled by loss of a mast, and that lumber contracted to be carried, consisting partly of strips and partly of boards, held no defense to a breach of contract of affreightment.—Edward Hines Lumber Co. v. Chamberlain, U. S. C. C. of App., Seventh Circuit, 118 Fed. Rep. 716.

156. STREET RAILROADS — Control of Cars. — In the operation of its cars at street intersections, it is the duty of a street railway company to have its cars under control, so as to protect the rights of pedestrians.—Sesselmann v. Metropolitan St. Ry. Co., 78 N. Y. Supp. 482.

157. TAXATION—Additional Taxes.—Under Rev. St. 1889, § 7537, the board of equalization of taxes had authority to assess additional taxes on property not given in by relator.—State v. Baker, Mo., 70 S. W. Rep. 872.

158. TAXATION — Illegal Assessment. — The remedy given by Rev. St. Ohio, § 5848, expressly authorizing suits to enjoin the illegal levy of taxes or assessments, or the collection thereof, may be enforced on the equity side of the federal courts. — Lander v. Mercantile Nat. Bank, U. S. C. C. of App., Sixth Circuit, 118 Fed Rep. 785.

159. TAXATION—Interstate Bridge.—It will be presumed that the value of an interstate bridge is in proportion to the length of the bridge. — Commonwealth v. Covington & C. Bridge, Co., Ky., 70 S. W. Rep. 849.

160. TAXATION — Railroad Property. — Assessment of estimated value of railroad property as "capital and surplus" held erroneous. — People v. Feitner, 78 N. Y. Supp. 308.

161. TAXATION — Time to File Complaint. — Failure to file complaint at proper term held not to entitle defendant to an extension of the time, limited by statute, within which to file a petition for removal.—Lewis v. Clyd S. S. Co., N. Car., 42 S. E. Rep. 969.

162. TRIAL — Indorsement of Credits. — Where a jury allowed credits pleaded in a suit on notes, but failed to find the dates thereof, it was not error to direct them to retire and correct the omission. — Bond v. Wilson, N. Car., 42 S. E. Rep. 956.

163. TRIAL — Instructions.—The refusal of the court to have a correct special instruction which is covered by general charge is not erroneous.—St. Louis S. W. Ry. Co. of Texas v. Smith, Tex., 70 S. W. Rep. 789.

164. TRIAL—Witnesses.—Refusal to permit a witness to testify, because he was present in court after the other witnesses had been put under the rule, held not error.—Illinois Cent. R. Co. v. Taylor, Ky., 70 S. W. Rep. 825.

165. TROVER AND CONVERSION—Pleading. — In an action for conversion of mine tailings, an allegation that plaintiff's decedent was "lawfully possessed" of the tailings and land on which they were located held a sufficient allegation of ownership.—Stanley v. Sierra Nevada Silver Min. Co., U. S. C. C., D. Nev., 118 Fed. Rep. 931.

166. TRUSTS—Limitations. — The statute of limitations begin to run against the right of an heir to enforce a constructive trust growing out of a trust existing in favor of his ancestor at the same time that it begins to run against the ancestor.—Lide v. Park, Ala., 33 So. Rep. 175.

167. TRUSTS— Payment of Income. — Insufficiency of the income of a trust fund to pay the regular monthly installments and leave enough to pay taxes, which were fixed liability, but not due, held not to justify a cessation of payment of income, where the taxes could be met when due. — *In re* Chesterman's Estate, 78 N. Y. Supp. 345.

168. TRUSTS— Promissory Note. — Where testator bequeathed to his wife the interest on a certain note for her life, the amount to be divided among specified legatees at her death, the executor holds the note as trustee, and may sell it and convey good title thereto — Marshall v. Myers, Mo., 70 S. W. Rep. 927.

169. VENDOR AND PURCHASER— Judicial Sale.—St. 1878, Gen. St. (Ed. 1887), p. 835, requiring a commissioner executing judgment of sale to have the land appraised, does not apply to an action on a note for purchase money of land reserving a lien. — Tichenor v. Wood, Ky., 70 S. W. Rep. 837.

170. VENDOR AND PURCHASER— Sale of Land. — Where one sells land from a fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds.—Leonard v. Forbing, La., 33 So. Rep. 203.

171. WILLS—Construction. — Beneficiary under a will held not entitled to bring a suit in equity for the construction of the will, because having an inadequate remedy at law. — McKinlay v. Van Dusen, 78 N. Y. Supp. 377.

172. WITNESSES—Cross-Examination.— Counsel of accused, in cross-exam ning impeaching witnesses, held not entitled to have answers detrimental to accused excluded from the jury.—Barnes v. Commonwealth, Ky., 70 S. W. Rep. 827.

173. WITNESSES—Evidence. — Where letters were used by a witness on direct examination, their production should have been compelled for the use of opposing counsel on cross-examination. — Schwickert v. Levin, 78 N. Y. Supp. 394.

174. WORK AND LABOR — Interference with Work.—A contractor, prevented by the owner from completing a building, held entitled to recover on *quantum meruit* for work done.—Day v. Eisele, 78 N. Y. 396.

175. WORK AND LABOR—Quantum Meruit.—A contractor under an express contract held entitled to recover on a *quantum meruit*, if the work and materials are of value and accepted by defendant. — Roskilly v. Steigers, Mo., 70 S. W. Rep. 909.